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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION, *et al.*,

Appellants,

v.

BRESWICK & CO., *et al.*, as Common Stockholders of Alleghany Corporation, etc.,

Appellees.

No. 82

BAKER, WEEKS & CO., *et al.*,

Appellants,

v.

BRESWICK & CO., *et al.*,

Appellees.

MOTION TO RETAX COSTS

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June 12, 1957.

IN THE

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Appellees.

MOTION TO RETAX COSTS

Appellees Breswick & Co., Myron Neisloss and Randolph Phillips move for an order retaxing costs as taxed by the Clerk in the sum of $4,400 in No. 36 and in the sum of $150 in No. 82, by relieving appellees of the payment thereof.

This motion is made pursuant to that part of Rule 57 of the Rules of this Court providing that costs shall

be allowed to appellants in cases of reversal of any judgment "unless otherwise ordered by the Court." The grounds of this motion are as follows:

1. Taxation of costs at this time against appellees is premature in view of the decision of this Court remanding this case to the District Court.

2. Taxation of costs against appellees would be inequitable and inappropriate.

A.

Taxation of costs at this time is premature.

Appellees complaint, as amended by their supplemental complaint herein, was for a final judgment setting aside the jurisdiction of the ICC and its orders with respect to the new issue of preferred stock of Alleghany Corporation. Appellees sought a permanent injunction against this issue upon two grounds: (1) That the ICC had no jurisdiction; and (2) that if the ICC had jurisdiction, its orders approving the issuance violated Section 20a of the Interstate Commerce Act. This Court reversed the final judgment of the District Court insofar as it was based on (1), and did not reach the issues raised by (2). It may well be that the District Court, upon the remand, will sustain appellees' complaint that the orders violated the Interstate Commerce Act and, therefore, that appellees will ultimately prevail herein.

The clerk has taxed printing costs in the amount of $4590. A substantial portion of these costs relates to the printing of documents bearing on the issue which this Court did not reach, namely, the validity of the preferred stock orders of May 26, 1955 and June 22, 1955 made by ICC's Division 4. They include the report of the ICC on the issue, the application of Alleghany, the proxy material, Exchange Offer, and other documentary

evidence such as exhibits before the ICC and pleadings in the District Court. None of this was relevant to the issue decided by this Court. In addition, a large part of the record derives from Alleghany's partial distribution of the preferred stock while appellees' application for a preliminary injunction was *sub judice* and after Alleghany had notice thereof.

It is normal practice not to tax costs until the disposition of an entire case and in the present posture of this case it is respectfully suggested that it is premature to tax costs at this time.

B.

Taxation of costs against appellees would be inequitable and inappropriate.

This action was instituted on June 6, 1955 after the ICC by Division 4, refused to permit appellees to be heard in a proceeding involving a reorganization of Alleghany's capital structure, including issuance of 45 million dollars in new preferred stock of Alleghany Corporation which the ICC held and which the District Court subsequently found would dilute the value of the common stock. Appellees owned only 1700 common shares in the aggregate and in effect, if not in form, sought intervention before the ICC in a representative capacity. The District Court permitted appellees to amend their complaint to recite its representative nature. All of the justices of this court, both majority and minority, agree that the threatened dilution gave appellees standing to sue.

Throughout the proceedings, both before the ICC and in the District Court, appellees urged that the Exchange Offer pursuant to which the preferred stock was to be issued, was grossly unfair to the holders of the common stock in that, at the expense of the company it rewarded

the holders of the preferred with a $15,000,000 premium in *excess* of the maximum legal claim of the holders of the preferred in violation of the equitable equivalent rule laid down by this court in *Schwabacher* v. *U. S.*, 334 U. S. 182, and in disregard of all applicable legal standards. The SEC, in a proceeding instituted by Alleghany to exempt the preferred stock from the application of the Investment Company Act, held that the Exchange Offer would produce a "grossly unfair result" to the common stockholders. This finding was based upon the testimony of Alleghany's own experts tendered in support of its application. It may well be that the District Court or the ICC which has held no evidentiary hearing and did not have the SEC evidence in its record will, upon a remand, make a similar finding.

This Court's majority opinion determining that the ICC has exclusive jurisdiction over Alleghany did not reach the question of the plan's unfairness which the District Court did not determine although asked to do so by all parties. In fact this Court remanded the proceeding to the District Court for a determination of that very question. In view of the holding of the SEC on the unfairness issue (as distinguished from specific Investment Company Act prohibitions) that the plan *was* unfair to the common stockholders, there is at the very least, a likelihood that the District Court or the ICC on remand, will, in the public interest and in consequence of the evidence and admissions before the SEC and the rule laid down in *Schwabacher,* reach a similar result.

We suggest that in view of the public interest aspects of this case referred to in the majority opinion and the substantiality of appellees' position which had the support of three justices of this court and with which the Solicitor General identified, it would be inappropriate to have small stockholders such as appellees, whose stock has a market value of only $16,000, bear the full brunt

of litigating these important questions against a corporation such as Alleghany with its more than $100,000,000 of assets.

WHEREFORE appellees pray for an order of this court granting their motion to re-tax costs, and upon such re-taxation, relieving appellees of payment of costs.

Respectfully submitted,

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June 12, 1957.

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No. 82

BAKER, WEEKS & Co., *et al.*, *Appellants*,

vs.

BRESWICK & Co., *et al.*

No. 114

INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

BRESWICK & Co., *et al.*

BRIEF FOR APPELLANT, ADELAIDE NEUWIRTH

ALEXANDER KAHAN and
ARTHUR W. LICHTENSTEIN,
Attorneys for Appellant,
ADELAIDE NEUWIRTH

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No. 114

INTERSTATE COMMERCE COMMISSION, *Appellant*,

vs.

BRESWICK & Co., *et al.*

BRIEF FOR APPELLANT, ADELAIDE NEUWIRTH

Appellant, Adelaide Neuwirth, owner of common stock in Alleghany Corporation, intervened as a defendant on her behalf and on behalf of common stockholders similarly situated in proceedings before the Statutory Court in the Southern District of New York, appeals from the final judgment of that Court entered December 23, 1955.

Statement

Alleghany Corporation (hereinafter referred to as Alleghany), sought and obtained approval of the Exchange Plan hereinafter described, from the Interstate Commerce Commission (hereinafter referred to as ICC).

The Appellees Breswick & Co. (hereinafter referred to as Breswick) and Randolph Phillips pro se, in June of 1955, brought suit to set aside orders of the ICC adjudicating Alleghany, a non-carrier, as subject to the jurisdiction of the Commission. The complaint charged that Alleghany was not within the jurisdictional regulation of the ICC but was subject to the regulatory provisions of the Investment Company Act of 1940. At a later time it developed that appellees proposed to strike down a voluntary exchange offer for alleged failure to register with the Securities and Exchange Commission (hereinafter referred to as SEC) and procure SEC approval to the Exchange Plan.

After approximately 900,000 shares of Alleghany's new 6% preferred stock had been delivered to the holders, an ex parte order was made restraining Alleghany, J. P. Morgan & Co. Incorporated, the Transfer Agent, and the Midland Trust Company of New York, the Exchange Agent, from issuing, distributing or transferring the new preferred stock (56). It may be interesting to note that at the time of the issuance of the ex parte restraining order directed to Alleghany, it was not a party in the suit.

Counsel for the appellees referring to the ICC orders approving the exchange of stock, in his plea for the restraining order asserted in his affidavit (57-58):

> "If this Court find, as plaintiffs contend, that no such jurisdiction lawfully exists, [Jurisdiction of ICC over Alleghany] the issuance of the securities will be null and the rights of thousands of innocent stockholders may be adversely affected. * * *, the situation will necessarily give rise to a multiplicity of suits and legal chaos to the great burden, expense and detriment of Alleghany and its stockholders."

Counsel then concludes:

> "Unless this Court intervene promptly by appropriate restraining order and preserve the status quo pending submission of the issues to the three-judge court next Thursday, irreparable injury will be caused to Alleghany Corporation, its common stockholders and all persons dealing in the new securities."

The restraining order was eventually embodied in the terms of an interlocutory injunction, with both District Judges in favor of the interlocutory injunction and the Circuit Judge opposed. Thereafter, Mr. Justice Harlan suspended the interlocutory injunction to the extent of 900,000 shares of the new 6% preferred stock already delivered to the holders under the Exchange (643-650). Subsequently the Statutory Court per curiam entered its final judgment.

Issue

This Appellant's brief is directed to a single issue on the instant appeal. Assuming appellees' right to challenge the orders of ICC upon jurisdictional grounds, nevertheless the Statutory Court erred in enjoining the preferred stock orders.

The Exchange Plan

The Exchange Plan as finally formulated invited holders of Alleghany 5½% cumulative preferred stock Series A $100 par value to exchange their stock for 10 shares of new 6% convertible preferred stock $10 par value. Series A 5½% preferred stock then outstanding carried at the particular time arrearages of approximately $132 per share. Each share of the new 6% preferred stock par value $10 is convertible at the option of the holder into 4.7 shares of common stock, upon the payment to Alleghany of $3.75 per share for each share of common stock received under the conversion. It was further provided that the new 6% convertible preferred may not be callable for redemption

prior to 1970. A further provision was made giving the new preferred the right to seat two directors on Alleghany's Board of Directors.

POINT I

The exchange offer is beneficial to Alleghany's common stockholders.

Roughly, 130,000 shares out of a total of approximately 136,000 shares of the old 5½% Alleghany preferred have been offered for exchange under the plan.

Total arrearages on all of the old 5½% preferred stock, in round numbers, amounts to $18,000,000. Upon completion of the exchange of 130,000 shares of old 5½% preferred stock for 1,300,000 preferred shares of new 6% preferred and upon conversion of the new 6% stock into common stock, Alleghany will have received about $23,000,000 in additional capital, and erased fixed arrearages of about $17,000,000 on the old 5½% preferred stock; on the debit side Alleghany will perhaps (if there is conversion) have issued additional shares of common stock.

To the extent that there is failure of conversion of the new 6% preferred stock into common stock, there will be a proportionate lessening in dilution of the asset value attributable to the common stock. The accumulated arrearages on the old 5½% preferred stock exchanged will have been entirely eliminated whether or not there is conversion. The common stockholders, including Appellees, will for the first time in over twenty years be in a position to receive dividends on their stockholdings.

True, there might some day in the remote future be a slight dilution of the asset value attributable to the common stock; but in all existing corporations where additional stock is issued, there is by necessity an element of dilution. In the present Exchange Plan, Alleghany is actually ad-

vantaged, and all classes of its stockholders are derivatively advantaged. To itemize in part the benefits:

(a) Onerous, burdensome and constricting arrearages totalling some $17,000,000 are cancelled out. The preferred arrearages, for many years, despite earnings, have proven to be barriers to dividends on common stock, depriving common stockholders of any return on their capital investment.

(b) The consummation of the Exchange Plan enables all classes of stock to receive their appropriate return on their respective investment.

(c) An especial benefit accruing to all common stockholders upon the completion of this exchange is an immediate increase in the net asset value attributable to the common stock and a resultant increase in the market price of the common stock.

We urge, that Alleghany and its common stockholders derivatively by reason of all this will have achieved distinct benefits, outweighing the effect of the remote speculative slight dilution. It is interesting to note, that upon the announcement of the Exchange Offer, the market price of Alleghany common stock, advanced to the highest levels attained in over two decades.

Of the common stockholders present in person or by proxy 97½% voted in approval of the Exchange Plan. This is the equivalent of more than 72% of the total issue of common stock of approximately 4,600,000 shares then outstanding. It is fair to infer, that the owners of common stock in Alleghany overwhelmingly, with almost complete unanimity favor the Exchange Plan.

In the course of argument before the Statutory Court, counsel for Alleghany pointed up many serious aspects of irreparable damage to Alleghany flowing from the restraining order. Alleghany for reasons there stated is disabled from legally holding and conducting stockholders meetings during the pendency of the injunction (59). For other serious injury to Alleghany see Hincks, C. J., dissenting opinion (634-636, 642).

Counsel for Appellees conceded that the operative effects of the injunction directed to the Exchange Plan, adversely affected the interests of the common stockholders of Alleghany. He said:

> "Indeed, our interests are hurt by the injunction because they own common stock, they own no preferred stock, and the price of their securities would go the other way if the preferred is restrained" (59).

The holders of millions of shares of Alleghany common stock wholly agree with this statement of Appellees' counsel. These holders of millions of shares do indeed want the benefits of this plan—not the injury of injunction.

POINT II

Equitable considerations require that injunctive relief be denied to the Plaintiffs-Appellees.

Some 130,000 shares of 5½% preferred stock have been exchanged. The Exchange Agent delivered 900,000 shares of the new 6% preferred stock to holders of 90,000 shares of the old 5½% preferred, in conformity with the Exchange Plan. By reason of mechanical limitations 400,000 shares of the new 6% preferred remained physically undelivered by the Exchange Agent to the holders of 40,000 shares of the old 5½% preferred.

The holders of the 400,000 shares have only unmarketable window tickets. The holders of the 900,000 shares have unmarketable new 6% preferred stock. Alleghany continues burdened with unmanageable arrearages if the injunction is sustained. The common stockholders remain in the same static status, deprived of potential dividends on their investment. $17,000,000 of arrearages, if the injunction is sustained, will stand as a bar to the receipt of

dividends by common stockholders; the holders of millions of shares of common stock will be deprived of an immediate increase in the price of their securities.

All this when the Exchange Offer has been fully consummated by physical delivery of 900,000 shares of new 6% preferred to the holders of the old 5½% preferred and by delivery of the 400,000 shares new 6% preferred to the Marine Midland Trust Company, Exchange Agent. In the last analysis, we submit, the Exchange Agent is as much the agent of the tendering stockholders as of Alleghany. Delivery to the stockholders' agent is delivery to the stockholders. Therefore, in all but physical delivery from agent to principal of some 400,000 shares, the exchange is fully consummated. Indeed, Mr. Justice Harlan, stated: (648-649)

> ". . .; and it may be that these shares have already become a valid issue, even if it is assumed, as plaintiffs contend, that proper approval was not secured. See A. C. Frost & Co. *v.* Coeur D'Alene Mines Corp., 312 U. S. 38 (1941)."

It has been suggested, that by reason of the muddled corporate structure, following these events, the credit of Alleghany Corporation has suffered impairment. This is not far fetched. The corporation has been under a disability in conducting stockholders' meetings. Matters necessarily to be presented to stockholders for consideration have been held in abeyance. To that extent the corporate enterprise has suffered paralysis. The credit structure by the same token has been seriously impaired in other respects as well. Problems of management and policy considerations remain unresolved pending the present corporate confusion. This is particularly distressing and destructive of the corporate enterprise in light of the expanding financial activities in the current market.

And, all this despite the declared will of more than 72% of the outstanding common stock voting in favor of the Exchange Plan.

Appellant contends that the Court has power, in the evaluation of the balance of equities, to permit the consummation of the Exchange Plan. In the memorandum opinion of Mr. Justice Harlan on application for a stay of injunction and supersedeas in the instant case, he stated that where the question is whether an injunction should be granted the irreparable injury facing the plaintiffs must be balanced against the competing equities before an injunction will issue.

Appellant urges that regardless of the legality of the assumption of jurisdiction by the ICC over Alleghany, the operative effects of the injunction directed against the Exchange Plan, created serious hardship and evoked grave irreparable injury to the interests of the corporate enterprise and its stockholders, far beyond any benefit that could conceivably accrue to the corporation. The injurious effects of the injunction continue and the irreparable damage suffered by the corporation and its stockholders increases with time. Equitable considerations compel the vacation of the Injunction.

The Court has power to adapt equitable remedies patterned to the exigencies of this extraordinary situation. See opinion of Mr. Justice Harlan in the instant proceeding *supra; Alabama* v. *U. S.*, 279 U. S. 230; *Inland Steel Co.* v. *U. S.*, 306 U. S. 153, pp. 156, 160, 161.

In *U. S.* v. *Detroit J. & L. Co.*, 200 U. S. 321 at page 339, the Court stated:

> "It is a mistake to suppose that for a determination of equities and equitable rights we must look only to the Statutes of Congress. The principles of equity exist independently of, and anterior to, all congres-

sional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases."

In *Graf* v. *Hope,* 254 N. Y. 1, at page 13, Cardozo, C.J., stated in a dissenting opinion, concurred in by Lehman and Kellogg, J.J.

> ". . .; for always the gravity of the fault must be compared with the hardship. Noyes *vs.* Anderson, supra; Lawrence *v.* American Nat. Bank, 54 N. Y. 432; Ball *vs.* Shepard, 202 N. Y. 247, 253, 95 N. E. 719. Let the hardships be strong enough, and equity will find a way though many a formula of inaction may seem to bar the path. Griswold *vs.* Hazard, 141 U. S. 260, 284, 11 S. Ct. 972, 999, 35 L. Ed. 678."
>
> "In this case, the hardship is so flagrant, the misadventure so undoubted, the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done."

In *Michelson* v. *Leskowicz,* 55 N. Y. S. 2d 831 at page 836, the Court cited and quoted from *Whalen* v. *Union Bag and Paper Co.,* 208 N. Y. 1, 4:

> "If the protection of a legal right even would do a plaintiff but comparatively little good and would produce great public or private hardship, equity will withhold its discreet and beneficent hand and remit the plaintiff to his legal rights and remedies."

The Court in *Michelsón* vs. *Leskowicz, supra,* then continued:

> "Every case of this character depends upon its own circumstances and equity will withhold as oppressive an injunction when the injury is not serious or substantial and the injunction would subject the other party to great inconvenience and loss."

It is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all, including the public, whose interests may be affected by the injunction. *Inland Steel Co.* v. *U. S.,* 306 U. S. 153.

In *McCann* v. *Chasm Power Co.*, 211 N. Y. 301 at page 306, the Court said:

> "It has many times been said by us and by the Courts of other states that under such or analogous facts a court of equity will not decree the issuance of a mandatory injunction. An equity court is not bound to decree an injunction where it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right. O'Reilly *vs.* N. Y. El. R. R. Co., 148 N. Y. 347; Gray *v.* Manhattan Ry. Co., 128 N. Y. 499; Knoth *v.* Manhattan Ry. Co., 187 N. Y. 243; McClure *v.* Leaycraft, 183 N. Y. 36; Llandudno Urban Dist. Council *v.* Woods, L. R. (2 Ch. 1899) 705; Levi *v.* Worcester Consolidated St. Ry., 193 Mass. 116; Atarkie *v.* Richmond, 155 Mass. 188; Bassett *v.* Salisbury Mfg. Co., 47 N. H. 426; Becker *v.* Levanon, etc., St. Ry. Co., 188 Pa. St. 484."

Judge Hincks in his dissenting opinion in the instant case when appellants sought to stay the injunction said:

> "I think the stay sought should be granted. The hardship both on Alleghany and its stockholders is plain. This was described in my dissenting opinion addressed to the plaintiffs' application for the preliminary injunction. The injunction granted at most has urgency only for its effect in restraining the completion of Alleghany's exchange offer. This feature of the injunction has its chief impact on innocent stockholders." (642)

The principle is well established that where damages are measurable in terms of money, the Court will not exercise equitable powers to restrain the continuance of a wrong. *Central Kentucky National Gas Co.* v. *Railroad Commission,* 290 U. S. 264.

In *Harrison* v. *W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 338, the Court per Brandeis, J., stated:

> "Where substantial redress can be afforded by the payment of money and issuance of an injunction

would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private. Compare Parker *v.* Winnipiseogee Lake Cotton and Woollen Co., 2 Black, 545, 552, 553, 17 L. ed. 333, 337, 338.[1] Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.[2] See D. M. Osborne & Co. *v.* Missouri P. R. Co., 147 U. S. 248, 258, 259, 37 L. ed. 155, 160, 161, 13 S. Ct. 299; New York *v.* Pine, 185 U. S. 93, 97, 46 L. ed. 820, 822, 22 S. Ct. 592; Cubbins *v.* Mississippi River Commission (D. C.), 204 Fed. 299, 307.[3] Such we think is the situation in the case at bar."

The injunction has cast a blight upon Alleghany and its innocent stockholders. Alleghany's conduct of its affairs is constricted and under partial paralysis. A large number of its stockholders are frozen and suffer financial restraints and hardships. The price structure of Alleghany's issued and outstanding shares is under a continuing deterioration. Against the irreparable and choking injury to the corporation and its stockholders there is at most a technical violation of administrative law.

POINT III

For all of the foregoing reasons this Court is respectfully requested to reverse the judgment of the Statutory Court and vacate its injunction.

Respectfully submitted,

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Attorneys for Appellant,
ADELAIDE NEUWIRTH.

CERTIFICATE OF SERVICE

We hereby certify that we have on this 12th day of December, 1956, transmitted for filing with the Supreme Court of the United States, an original signed copy and forty conformed copies of the foregoing Brief and have duly served by mail conformed copies thereof, postage prepaid, properly addressed to the following:

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v.

BRESWICK & CO., ET AL.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 36

ALLEGHANY CORPORATION, ET AL., APPELLANTS

v.

BRESWICK & CO., ET AL., AS COMMON STOCKHOLDERS OF ALLEGHANY CORPORATION, ETC.

No. 82

BAKER, WEEKS & CO., ET AL., APPELLANTS

v.

BRESWICK & CO., ET AL.

No. 114

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

BRESWICK & CO., ET AL.

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The majority opinion of the District Court granting an interlocutory injunction (R. 601–628) is reported at 134 F. Supp. 132. The dissenting opinion (R. 628–

639) was inadvertently omitted in reporting. The opinions of an evenly divided court denying supersedeas pending appeal (R. 639–641, 642) are not reported. Mr. Justice Harlan's opinion granting partial supersedeas pending appeal (R. 643–650) is reported at 75 Sup. Ct. 912.

The principal opinion of the District Court on final decree (R. 651–673) rendered November 18, 1955, is reported at 138 F. Supp. 123. Supplemental opinions of December 23, 1955 (R. 674–675) and January 27, 1956 (R. 680) are not reported. Memorandum opinions of January 27, 1956, denying the motion of Alleghany Corporation for a new trial (R. 675–678) and denying the motion of Baker, Weeks & Co., et al., for reargument (R. 679–680) are reported at 138 F. Supp. 138.

The reports in Finance Docket No. 18656 of Division 4 of the Interstate Commerce Commission (R. 414–446) and of the entire Commission (R. 506–515), respectively dated March 2 and May 24, 1956, approving a merger and lease of carrier properties and subjecting Alleghany to carrier status, are reported at 290 I. C. C. 725 and 295 I. C. C. 11. The report of Division 4 in Finance Docket No. 18866 (R. 518–536), dated May 26, 1956, approving a proposed exchange of Alleghany preferred stock, is not reported.

JURISDICTION

The judgment of the District Court was entered on December 23, 1955 (R. 555–557); motions for a new trial and for reargument were denied January 27, 1956 (R. 675–678; 679–680); and the Commission

filed its notice of appeal in the District Court on March 26, 1956 (R. 1–2). Probable jurisdiction was noted as to the Commission's appeal on October 8, 1956 (R. 682). The jurisdiction of this Court rests on 28 U. S. C. 1253 and 2101 (b).

STATUTES INVOLVED

Sections 1 (3) (b); 5 (2), 5 (3), and 5 (4) of the Interstate Commerce Act. 24 Stat. 379, as amended, 49 U. S. C. 1 (3) (b), 5 (2), 5 (3), 5 (4) are set forth in Appendix A.

QUESTIONS PRESENTED

1. Whether, in approving a merger of two companies already controlled by New York Central and through it by Alleghany Corporation, the Commission was authorized by Section 5 (3) to provide that Alleghany Corporation should be considered as a carrier for specified purposes.

2. Whether the district court erred in holding that the acquisition by a person not a carrier of control of an integrated railroad system which is composed of two or more railroad companies, involves an acquisition by such person of two or more carriers which requires approval of the Commission under Section 5 (2).

3. Whether the district court erred in holding that the Commission's conclusion that Alleghany Corporation controlled New York Central could not stand because

(a) neither the Commission's findings nor the evidence support that conclusion; and

(b) the Commission failed to hold a hearing as to whether such control existed.

4. Whether a three-judge court convened under the Urgent Deficiencies Act (28 U. S. C. 1336, 1337, 2321–2325) possesses jurisdiction to enjoin an asserted violation of the Investment Company Act (15 U. S. C. 80a).

5. Whether the district court erred in setting aside the Commission's orders determining that Alleghany should be considered as a carrier pursuant to Section 5 (3) and authorizing its issuance of new preferred stock.

STATEMENT

This case arises out of orders of the Interstate Commerce Commission issued under Sections 5 and 20a of the Interstate Commerce Act, which, among other things, determined that Alleghany Corporation should be considered as a carrier for the purpose of security issues and authorized Alleghany to issue new 6% convertible preferred stock in exchange for its outstanding 5½% preferred stock. The court below set aside the Commission's orders in part and enjoined Alleghany from proceeding with the preferred stock exchange. The pertinent facts may be stated chronologically as follows:

Prior to June 5, 1945, Alleghany was a registered investment company under the Investment Company Act of 1940, which is administered by the Securities and Exchange Commission. In September 1944, the Chesapeake & Ohio Railroad Company (Chesapeake and Ohio) applied under Section 5 (2) of the Interstate Commerce Act for approval and authorization

of its acquisition of the properties and franchises of Norfolk Terminal and Transportation Company, a wholly-owned subsidiary of Chesapeake & Ohio. Later, Alleghany filed an application which, as amended, was construed by the Commission as seeking approval of (1) Alleghany's acquisition of control, through its control of Chesapeake & Ohio, of the properties of the Norfolk Terminal & Transportation Company, and (2) Alleghany's continued control of the Chesapeake & Ohio, Nickel Plate and Pere Marquette railroads. On June 5, 1945, the Commission (Division 4) issued its report (261 I. C. C. 239) and order (R. 183–185), which in effect granted Alleghany's amended application, and "ordered, That unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20a (2) to (11), inclusive, of the Interstate Commerce Act * * *" (R. 185).

Section 3 ((c) (9) of the Investment Company Act exempts from regulation by the Securities & Exchange Commission under that act "any company subject to regulation under the Interstate Commerce Act." Accordingly, on October 4, 1945, after a hearing, SEC issued its order (R. 185–186) declaring "that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940", and "that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act as set forth in such Findings and

Opinion, this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing."

On January 28, 1954, Alleghany, through its counsel, advised the Interstate Commerce Commission that "Alleghany, Young and Kirby have * * * completely divested themselves of control of the Chesapeake & Ohio" (R. 274).[1]

As Division 4 of the Commission stated in its report in *Louisville & Jeffersonville Bridge And Railroad Company Merger, etc.*, 290 I. C. C. 725, 731–732 (R. 423) (the Bridge Company proceeding):

> * * * by order of June 22, 1954, we requested Alleghany to show cause on or before July 15, 1954, why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applies to and provides that Alleghany shall be considered as a carrier subject to certain portions of the Act, unless and until otherwise ordered. On June 29, 1954, Alleghany requested that we postpone any determination of withdrawal of Alleghany's status as a carrier under the Act, and that it be permitted until October 1, 1954, to respond to this aspect of the show cause order. We denied that request.
>
> On July 14, 1954, Alleghany responded to the order to show cause and stated it would be ready at a proper time to accept an order terminating its control of Chesapeake, and requested that action regarding Alleghany's

[1] It appears to be undisputed that during the intervening years Alleghany divested itself of control of Nickel Plate, and that Pere Marquette was merged into Chesapeake & Ohio.

status as a carrier be withheld until Central, Alleghany, Big Four, and Jeffersonville complete preparation of, and file an application under section 5 (2) for authority, among other things, to merge the properties of the latter two, and through control of Big Four, for the first two to control the properties of Jeffersonville. * * *. On July 23, 1954, we ordered action on the show cause withheld for 60 days to permit the filing of the joint application.

The Bridge Company merger and lease proceeding.—On September 20, 1954, Alleghany, the New York Central Railroad Company, the Cleveland, Cincinnati, Chicago and St. Louis Railroad Company (Big Four), the Louisville and Jeffersonville Bridge & Railroad Company (Bridge Company) filed a joint application (R. 210–235) under Section 5 (2) of the Interstate Commerce Act for (1) approval of the merger of the Bridge Company into Big Four, (2) approval of a modification of an existing lease of Big Four's properties to New York Central so as to subject the Bridge Company properties to such lease, (3) approval of acquisition of control by Alleghany and New York Central, through their control of Big Four, of the properties of the Bridge Company, and (4) continuation of Alleghany's status as a carrier subject to the provisions of Sections 20 (1) to (10) and 20a (2) to (11) of the Act. The joint application described the relationships between the applicants, as follows (R. 217–218):

7. The Big Four is controlled by the Central by reason of the latter's ownership of 465,514 shares of the common capital stock and 86,436

shares of the preferred capital stock of the Big Four, constituting 98.98 per cent and 86.45 per cent, respectively, of the total number of shares of each class outstanding. The railroad and properties of the Big Four are operated by the Central under lease dated January 2, 1930 (effective February 1, 1930) for a term of ninety-nine years, * * *.

The Bridge Company is controlled by the Big Four and the Central by reason of the Big Four's ownership of all of the capital stock of the Bridge Company, which is held by the Central under the terms of the Lease.

The Big Four and the Bridge Company are indirectly controlled by Alleghany, which recently acquired control of the Central as the result of a proxy contest in which the slate of directors nominated by Alleghany was elected as the Central's Board of Directors. Alleghany has an undivided one-half interest in 600,000 shares of Central stock with voting rights to said 600,000 shares under joint venture agreements. In addition to said 600,000 shares, Alleghany has 15,500 shares of Central stock. These voting rights of Alleghany represent almost 10 per cent of the total shares of the Central outstanding. The Chairman of the Board of Directors of Alleghany is Chairman of the Board of Directors of the Central, the President of Alleghany is a Director of the Central, and the Vice-President of Alleghany is a Vice-President of the Central. The Chairman of the Board of Directors of Alleghany and of Central beneficially owns 100,200 shares of Central stock. The President of Alleghany beneficially owns 300,100 shares of Central stock.

On September 24, 1954, the Securities and Exchange Commission filed a petition for leave to intervene (R. 190–191) in the proceeding for the purpose of filing a memorandum, and this petition was granted. S. E. C. urged that as a matter of discretion under Section 5 (3) the Interstate Commerce Commission should refrain from subjecting Alleghany to regulation as a carrier and permit S. E. C. to regulate Alleghany as an investment company under the Investment Company Act. Petitions to intervene filed by appellee Breswick & Co. (R. 317, 392) and other persons (R. 269) were denied by Division 4 of the Commission (R. 324, 368, 412).

On March 22, 1955, Division 4 issued its report in which it found (1) that a public hearing was not necessary in the public interest (R. 416), (2) that the relationships between the four applicants were as stated in their application and, specifically, that "control of [N. Y. Central's] functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors" (R. 417), and (3) that the merger and lease of the Bridge Company properties were transactions within the scope of Section 5 (2) and would be consistent with the public interest (R. 443). Division 4 ordered that "Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable

to The New York Central Railroad Company and its carrier subsidiaries and affiliates" and "That the effective portions of the order of June 5, 1945, in Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc., be and they are hereby terminated and shall be of no further force and effect." (R. 447.)

Thereafter, the Securities and Exchange Commission filed a petition for reconsideration, and petitions to intervene and for reconsideration were filed by appellees Breswick and Phillips and other persons.

On May 24, 1955, the entire Commission issued its report on reconsideration. It granted the petitions to intervene, but denied the appellees' request for a hearing. Rejecting the appellees' contention (R. 392) that Alleghany did not control N. Y. Central, the Commission concluded as follows:

> The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. (R. 513.)

The entire Commission further held that Alleghany's acquisition of control of an integrated carrier system, comprised of New York Central and its subsidiaries, did not involve an acquisition of control of two or more carriers which required approval under Section 5 (2). Applying this Court's decision in *United*

States v. *Marshall Transport Co.*, 322 U. S. 31, the Commission held that the merger and lease of the Bridge Company properties constituted a modification of Alleghany's control of those properties which required approval under Section 5 (2). Approving such modification of control, the Commission determined, pursuant to Section 5 (3) that Alleghany should be considered as a carrier subject to the provisions of Section 20 (1) to (10) (reports and accounts) and Section 20a (2) to (11) (security issues and assumptions of carrier liabilities).

The Boston & Albany Proceeding.—In the meantime, on December 17, 1954, N. Y. Central filed an application under Section 5 (2) seeking approval of its acquisition of control by stock ownership of the Boston & Albany Railroad Company, the Pittsfield & North Adams Railroad Corporation, and the Ware River Railroad Company (R. 565–599). The properties of these three carriers were already operated by N. Y. Central under leases of varying length, but N. Y. Central had only a minority stock interest in the Pittsfield and none in the other two carriers (R. 454). Alleghany joined in the application to request approval of its acquisition of control, through its control of N. Y. Central, of the Boston & Albany, Pittsfield and Ware River railroads. On March 22, 1955, the Commission's Division 4 issued its report and order (R. 450–473) approving the proposed acquisitions of control and noting that it had already, in the Bridge Company case decided on March 2, "held that Alleghany should continue to be considered a carrier subject to the provisions of Section 20 (1)

to (10), inclusive, and Section 20a (2) to (11), inclusive, of the Act to the same extent as applicable to New York Central and its subsidiaries and affiliates." (R. 453.)

The preferred stock proceeding.—On February 18, 1955, Alleghany filed an application seeking the Commission's authorization under Section 20a of the Interstate Commerce Act for it to issue not exceeding 1,367,440 shares of 6% convertible preferred stock in exchange for outstanding shares of its cumulative 5½% preferred stock Series A, and to issue not exceeding 14,768,352 shares of its common stock upon conversion of the convertible preferred stock (R. 371–391). The Commission's order of April 20, 1955, permitted the appellees and others to intervene in opposition to the application (R. 519). On May 26, 1955, Division 4 issued its report and order in Finance Docket No. 18866, finding that a hearing was unnecessary[2] and analyzing and authorizing, with one change, the proposed security transactions as satisfying the standards of Section 20a[3] (R. 518–536). While the intervenors contended that the proposed transactions would be unfair to Alleghany's common

[2] Section 20a (6) (49 U. S. C. 20a (6)) provides that "The Commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority."

[3] Section 20a (2) provides that the Commission may authorize a security issue only if it finds that such issue "(a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

stockholders, Division 4 noted that the necessary amendments to Alleghany's charter had been approved by the holders of 70 percent of the total outstanding common stock, which constituted 97 percent of the common stock which was voted (R. 534).

On June 2, 1955, the appellees and others filed a petition for reconsideration by the entire Commission (R. 537–544). The entire Commission, by order dated June 22, 1955, denied the petition and directed that the order of Division 4 (which was stayed by the filing of the petition) become effective on that date (R. 554).

The district court proceedings.—On June 6, 1955, the appellees Breswick & Co. and Phillips filed a complaint (R. 32–38) in the United States District Court for the Southern District of New York, seeking to set aside the Commission's orders of March 2 and May 24, 1955, in the Bridge Company proceeding.

On June 23, 1955, District Judge Dimock issued an order temporarily restraining Alleghany "from issuing, distributing, or transferring any of the 6% Convertible Preferred Stock of Alleghany Corporation" (R. 56). Also, on June 23, Alleghany had begun to carry out the preferred stock exchange. We understand that the restraining order and the later injunctions prevented the completion of the exchange with practical consequences to Alleghany's preferred stockholders which, for lack of direct knowledge, we leave for description by the appellants in Nos. 36 and 82. However, in the opinion (R. 643–650), dated August 3, 1955, of Mr. Justice Harlan, Circuit Justice, in granting a partial stay of the temporary injunction

[3a] Appellee Neisloss petitioned for leave to intervene as a plaintiff on September 6 (R. 141), and his petition was granted on December 23, 1955 (R. 558).

pending appeal, the situation then was described as follows (R. 647–548):

> * * * Alleghany had about 136,000 shares of Class A preferred stock outstanding, all but about 24,000 of which were held by the general public. Approximately 130,000 shares of this stock have been delivered to Alleghany for exchange. 900,000 shares of the new preferred stock were issued in exchange for 90,000 of these shares before any action by the District Court. The temporary injunction bans the further transfer of those 900,000 shares by Alleghany or its agents, and also forbids the issuance of additional shares. Thus the 900,000 shares are not readily marketable or acceptable as collateral, and the holders of some 40,000 shares of the old stock are not able to receive from Alleghany the 400,000 shares of new stock to which they are entitled under the exchange offer.

On July 13, 1955, the appellees amended their complaint so as to also attack the Commission's preferred stock orders of May 26 and June 22, 1955 (R. 94–101). Both the original and amended complaints alleged generally that the acts complained of would deprive Alleghany's common stockholders of rights and protections under the Investment Company Act.

A three-judge court was constituted, consisting of Circuit Judge Hincks and District Judges Dimock and Walsh. After a hearing, an interlocutory injunction (R. 103–108) was issued on July 26, 1955, enjoining enforcement of or action pursuant to (a) the Commission's orders in the Bridge Company proceed-

ing in so far as they determine that Alleghany Corporation is in control of the New York Central Railroad and in so far as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20a (2) to (11), inclusive, of the Interstate Commerce Act, or (b) the orders of the Commission dated May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock; and enjoining Alleghany from proceeding with the preferred stock exchange. The interlocutory injunction was accompanied by an Opinion Granting Application For Interlocutory Injunction (R. 601–628), in which Judge Dimock and Judge Walsh concurred. Judge Hincks wrote a dissenting opinion (R. 628–639), expressing the reasons for his view that the application for an injunction should be denied.

A motion addressed to the three-judge court for a suspension of the temporary injunction pending appeal was denied on July 26, 1955. Judges Hincks and Dimock being divided and Judge Walsh absent (R. 639–642). On August 3, 1955, Mr. Justice Harlan, as Circuit Justice, in an opinion in which he noted that appellees owned but 700 shares of Alleghany common stock out of approximately 4,600,000 shares outstanding, stayed the temporary injunction "insofar as it relates to the 900,000 shares of new preferred stock which have been issued, and let the injunction stand as regards the 400,000 unissued shares." (R. 648)

On November 13, 1955, following further proceedings, the three-judge court (with Judge Frank sitting in place of Judge Hincks because of the latter's illness (R. 652)) issued its opinion in which it held that the injunction should be made permanent (R. 651–673). The Court's final judgment (R. 555–557) (1) set aside the Commission's orders in the Bridge Company case except in so far as those orders approved (a) the merger of the Bridge Company into Big Four, (b) "through ownership of the stock of [Big Four], control of the said properties and franchises by the New York Central Railroad Company," and (c) the lease of those properties by Big Four to New York Central; (2) set aside the Commission's orders which authorized the preferred stock exchange; and (3) enjoined Alleghany from proceeding with the preferred stock exchange. Enforcement of the judgment was stayed, pending appeal to this Court, as to the 900,000 shares of new preferred stock issued prior to the partial stay granted by Mr. Justice Harlan (R. 557).

On December 31, 1955, Alleghany filed a motion to amend the judgment or for a new trial (R. 560–596), contending, in general, that the Commission's order in *Boston and Albany Railroad Company, et al. Control,* Finance Docket 18789, decided March 22, 1955 (R. 450–473) (referred to, supra, at pp. 11–12) provided an alternative basis for the Commission to determine under Section 5 (3) that Alleghany should be considered as a carrier for the purpose of regulation of security issues under Section 20a. This motion was

denied in a *per curiam* opinion of the district court on January 27, 1956 (R. 675–678). On the same date, the court denied the motion of appellants Baker, Weeks & Co., et al., for reargument (R. 679–680).

Subsequent proceedings before the Securities and Exchange Commission.—On December 9, 1955, Alleghany registered with the Securities and Exchange Commission as an investment company under the Investment Company Act, reserving its rights to continue this litigation in which it contends, in effect, that it is not subject to that Act. Thereafter, Alleghany filed with the Securities and Exchange Commission applications for a determination that its approval was not required for the preferred stock exchange and, in the alternative, for a retroactive exemption under Section 6 (c) of that Act from its provisions. On November 30, 1956, after a hearing, the Securities and Exchange Commission denied these applications, Commissioner Patterson dissenting (Investment Company Act Release No. 2446).

SUMMARY OF ARGUMENT

I

The merger of Bridge Company into Big Four and the lease of Bridge Company's properties by Big Four to New York Central constituted an acquisition of control by Alleghany, a non-carrier which controls a carrier (Central), within the meaning of Section 5 (2), so that the Commission was empowered by Section 5 (3) to consider Alleghany as a carrier subject to Section 20 (1) through (10) (relating to reports

and accounts) and Section 20a (2) through (11) (relating to issues of securities and assumptions of liabilities).

In *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1945), the Court held that the acquisition of the property and franchises of one carrier by a carrier controlled by a non-carrier involves an acquisition of control by the non-carrier for which Commission approval is required by Section 5 (2) (a). Since the *Marshall Transport* case, the Commission has held repeatedly and consistently that a lease and merger of the properties of carrier subsidiaries in an integrated system results in an acquisition of control in new form of the carriers by the parent which requires Commission approval under Section 5 (2). See, *e. g., Chesapeake & Ohio Railway Company Purchase, etc.*, 261 I. C. C. 239 (1945); *Nicholas, Fayette & Greenbriar R. Co., Lease*, 261 I. C. C. 546 (1945); *Pere Marquette Ry. Co. Merger*, 267 I. C. C. 207.

The fact that the controlling parent is an indirect parent, such as Alleghany here, rather than a direct parent is not a valid distinction, else the really controlling parent could avoid regulation under Section 5 (3) by the expedient of creating an intermediate holding company. See *Electric Bond & Share Co.* v. *S. E. C.*, 303 U. S. 419, 440. Further, the broad definition of "control" as found in Section 1 (3) (b) manifests a Congressional purpose to encompass every conceivable method of exercising control within the provisions of Section 5 (2). See *United States* v. *Marshall Transport Co., supra*, pp. 38–39.

Contrary to the holding of the district court, a modification of an existing control of carriers is as much an acquisition of control within the meaning of Section 5 (2) as is a new acquisition of control of a previously uncontrolled carrier. *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 22–23 (1932). In that case, the pertinent statutory provision empowered the Commission to authorize the acquisition by one carrier of control of another carrier. In rejecting the contention that the Commission could not authorize an acquisition of control by lease where control already existed through stock ownership, the Court said (p. 23):

> * * * If the expected advantages are inadequately secured by stock ownership and would be better secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists.

The legislative history of Section 5 supports this interpretation of the phrase "acquisition of control". It also reflects a Congressional purpose to subject all transactions affecting the combination of railroads to Commission supervision and control and to subject non-carriers involved in such transactions to Commission regulation.

The last clause of Section 5 (2) (a) (i), providing that without the Commission's approval it shall be unlawful "for a person which is not a carrier and which has control of one or more carriers to acquire control through ownership of stock *or otherwise,*" was added by Congress to make clear its intention that all forms of acquisition of control shall require Com-

mission approval. See H. R. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68–69.

When an increase or other modification in a non-carrier's direct or indirect control of a carrier is proposed, the purposes of Section 5 (3) require that the non-carrier seek the Commission's approval under Section 5 (2). See the *Marshall Transport* case, *supra*, pp. 41–42. Changes in the type and form of control produce significant consequences which require that the parent non-carrier be subjected to Commission jurisdiction in the public interest.

II

Commission approval of Alleghany's acquisition of control of the New York Central system was not a prerequisite to the Commission's assumption of jurisdiction under Section 5 (3) to order that Alleghany be considered as a carrier.

A. Alleghany's acquisition of control of the New York Central system was not an acquisition of control of two or more carriers within the meaning of Section 5 (2) (a) (i), requiring Commission approval. When Alleghany acquired its control, the Central system was an integrated unit in which all the properties were under long established unified operating control. The legislative history of Section 5 forces the conclusion that Congress intended to subject holding companies to Commission control whenever they engage in transactions affecting unification of carriers, either by bringing about a new combination or modifying an existing combination. Conversely, it also demonstrates that Congress did not intend to require Commission approval of acquisitions

of control by holding companies lacking any element of unification, as in the case of Alleghany's acquisition of Central.

The practical consequences of requiring Commission approval of transfers of control of established railroad systems are persuasive against such a construction of the statute. Where Commission approval is sought in advance by persons seeking to obtain control by means of a proxy contest, the resulting delay may well foreclose any chance of success. Were Commission approval sought after the fact, the Commission would be in the position of approving or disapproving new management selected by the stockholders.

B. Assuming, *arguendo,* that Alleghany's acquisition of control of Central was a transaction within Section 5 (2) requiring Commission approval, the Commission was entitled to consider the fact of Alleghany's control in passing on the application before it and, consequently, in determining that it should subject Alleghany to regulation. See *Frost & Co.* v. *Coeur D'Alene Mines Corp.,* 312 U. S. 38, 41–43.

III

The Commission's findings as to Alleghany's control of Central are sufficient and are adequately supported by the evidence. Both Division 4 and the entire Commission made clear findings that Alleghany controlled Central based upon evidence of record as to Alleghany's holdings of Central stock, interlocking officers and directors of Alleghany and Central, and the election of Alleghany's nominees to Central's board of directors.

These findings were not vitiated because the appellees were not accorded an evidentiary hearing on the issue of control. Section 5 (2) (b) vests the Commission with discretionary power to dispense with a "public hearing." Drawing on notification language in Section 5 (2) (b) and on Section 17 (3), providing that all Commission hearings shall be public at the request of any interested party, the district court arrived at the novel conclusion that the Commission was required to conduct a non-public evidentiary hearing. A reasonable construction of the hearing provisions in Section 5 (2) (b) in the light of the brief legislative history of the clause giving the Commission discretion to dispense with a "public hearing", can only lead to the conclusion that by "public hearing" is meant the usual formal hearing for the taking of evidence which is open to the public, and that the Commission asked Congress for, and was given, discretion to dispense with such a hearing.

It was not an abuse of discretion for the Commission to refuse to conduct a hearing on the basis of the unsupported, contradictory, and irrelevant representations of holders of a small fraction of Alleghany's stock. In permitting the appellees to intervene for the purpose of urging reconsideration of the Division 4 report, the Commission did consider the views presented in their petitions and affidavits as to the law and proper interpretation of Section 5.

IV

Even assuming that the district court was correct in its determination that the Commission was without

jurisdiction to consider Alleghany as a carrier pursuant to Section 5 (3) for the purposes of Section 20a, relating to issuance of securities, that conclusion establishes only that Alleghany was free to issue its new preferred stock without Commission approval. In enjoining Alleghany from taking any steps to carry out the preferred stock exchange, the court, as its opinions make abundantly clear, was undertaking to enforce the Investment Company Act, and in so doing was acting outside of the jurisdiction conferred upon it by the provisions of the Urgent Deficiencies Act (28 U. S. C. 1336, 1337–2321–2325) under which it was assembled. *Great Northern Ry.* v. *United States,* 277 U. S. 172.

ARGUMENT

I. In approving a merger of the Bridge Company into Big Four and a lease of the Bridge Company's properties to New York Central, the Commission was empowered to provide that Alleghany should be considered as a carrier for certain purposes

It is clear that the proposal to merge the Bridge Company into Big Four was a transaction which required the approval of the Interstate Commerce Commission under Section 5 (2). It is equally clear that the companion proposal for a lease of the properties of the Bridge Company by Big Four to New York Central was a transaction for which Section 5 (2) required the approval of the Commission. Indeed, the final judgment of the court below specifically refrains from interfering with the Commission's approval of these merger and lease transactions. Moreover, that court also sustained the Commission's orders in the *Bridge* case "insofar as they approved

and authorized * * * through ownership of the stock of [Big Four] control of the said properties and franchises [of the Bridge Company] by the New York Central Railroad Company" (R. 555–556). Thus, the issues before this Court involve only the relationship of Alleghany to these transactions in terms of the regulatory scheme of Section 5.

In September 1954, Big Four and the Bridge Company sought the Commission's approval of the merger of the Bridge Company into Big Four, and New York Central sought approval of a lease to it from Big Four of the Bridge Company properties. In the same application, Alleghany, asserting that it then controlled New York Central (R. 216–217), requested a Commission order approving its acquisition and control, through New York Central, of the properties and franchises of the Bridge Company, and providing (pursuant to Section 5 (3)) that Alleghany should continue to be considered as a carrier subject to the provisions of Section 20 (1) to (10) and Section 20a (2) to (11) of the Interstate Commerce Act (R. 211, 216).

The Commission (Division 4) granted Alleghany's application (R. 443, 447). In affirming, upon reconsideration, the action of Division 4, the full Commission held that under *United States* v. *Marshall Transport Co.*, 322 U. S. 31, Alleghany was a necessary party to the application for approval of the merger and lease transactions, in that Alleghany "was in fact a person not a carrier which controlled an established system [New York Central], and which was seeking authorization under Section 5 (2) for modified control of one of the system subsidiaries" (R. 514–515).

Having approved modified control by Alleghany of the properties of the Bridge Company, the Commission, pursuant to Section 5 (3), ordered that Alleghany be considered as a carrier subject to the provisions of Section 20 (1) to (10) and Section 20a (2) to (11) of the Interstate Commerce Act (R. 447, 515, 517).

The Court below held that *modification* of Alleghany's existing indirect control (via N. Y. Central and Big Four) of the Bridge Company, as distinguished from a new acquisition of control over a previously uncontrolled carrier, did not require the Commission's approval under Section 5 (2) and, accordingly, that the Commission was without jurisdiction under Section 5 (3) to determine that Alleghany should be considered as a carrier for certain purposes. In so holding, we contend that the Court below erred.

Section 5 (2) (a) (i) provides that it shall be lawful, with the approval and authorization of the Commission as provided in Section 5 (2) (b), (1) for two or more carriers to merge or consolidate their properties or franchises "into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership", (2) for one or more carriers to purchase, lease, or contract to operate properties of another carrier, (3) for a carrier, or two or more carriers jointly, to acquire control of another carrier "through ownership of its stock or otherwise", (4) for a person which is not a carrier to acquire control of two or more carriers "through ownership of their stock or otherwise", and (5) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier "through ownership of its stock or otherwise".

Section 5 (3) provides that whenever a non-carrier is authorized, by an order entered under paragraph (2) to acquire control of a carrier or carriers, such non-carrier "thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, * * * (which relate to reports, accounts, and so forth, of carriers), and Section 20a (2) to (11), inclusive, * * * (which relate to issues of securities and assumptions of liability of carriers)".

It is entirely clear that the provisions of the first three clauses of Section 5 (2) (a) (i) are not mutually exclusive in the sense, for example, that where the Commission has approved the acquisition by carrier A of control by stock ownership of carrier B, the properties of B may thereafter be merged into or leased to A without further authorization by the Commission. If this were not so, the complete control which Congress intended the Commission to exercise over all combinations and consolidations of carriers would not exist. See, e. g., S. Rep. No. 87, 73d Cong., 1st Sess., pp. 8–9; H. R. Rep. No. 193, 73d Cong., 1st Sess., p. 16. The pattern of Commission regulation of carrier combinations reflects its adherence to this principle.

Thus, the Commission has held that where one carrier controls another carrier by stock ownership, the merger of the latter into the former requires approval under Section 5 (2). *Pere Marquette Ry. Co. Merger,* 267 I. C. C. 207 (1947); *Chesapeake & Ohio Ry. Co. Purchase,* 261 I. C. C. 239 (1945). Again, the de-

cision of the court below assumes that the merger of the Bridge Company into Big Four was subject to Section 5 (2).

The Commission repeatedly has held that the enhancement of an existing form of control requires approval under Section 5 (2). Thus, in *Control of Big Four by New York Central*, 72 I. C. C. 96 (1922), Central, which already controlled Big Four through ownership of a majority of the latter's common stock, sought and obtained the approval of the Commission for its proposed purchase of at least a majority of the preferred stock of Big Four. The significance of such purchase, from the viewpoint of control, was that the consent of a majority of the preferred stock was acquired for certain important corporate actions. For a series of cases holding that a change from substantially less than 100 percent stock ownership to such full stock ownership requires approval under Section 5 (2), see *Black Hills Stages, Inc.—Purchase*, 25 M. C. C. 529 (1939); *L. G. Hogshire—Control*, 35 M. C. C. 487 (1940); *Carey and Beveridge—Control*, 45 M. C. C. 165 (1946); *Capitani—Control*, 58 M. C. C. 414 (1952).

In other cases, the Commission has held that changes in the method of control of carriers requires its approval under Section 5 (2). For example, in *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M. C. C. 469 (1938), Division 5 held, over objection, that where the railroad proposed to acquire direct control of a motor carrier by purchasing 55 percent of the latter's common stock from another subsidiary of the railroad, the Commission's approval

under Section 213 (a) (since consolidated with Section 5) is required for such a shift from indirect to direct control. It was there contended, as in this case, that once a carrier has acquired control of another carrier "it may modify or shift the form of control without our approval or authorization under section [5 (2)] because it is not thereby acquiring control within the meaning of the section". However, Division 5 concluded (at pp. 471–472) that—

> It is clear that one of the purposes of the section is to make sure, if an acquisition of control is approved, that its terms and conditions shall be just and reasonable. However, if a railroad could secure approval of an acquisition of indirect control upon terms which we find to be just and reasonable, and could then, without our supervision, shift such indirect control to dire control, it could at the same time also, by means of such transaction, in effect modify the terms and conditions upon which control is held. For this reason we believe that to give effect to the obvious intent of the section a change in character of control must be regarded as a transaction requiring our approval and authorization under section 213 (a) and (1). It is evident that otherwise a control consistent with the public interest might be so changed as to become inconsistent therewith. As a further illustration of what might happen, a desirable direct control might be shifted to an undesirable indirect control.

See also *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473, 475 (1941); *Warrior*

& Gulf Nav. Co. Control, 250 I. C. C. 26, 28 (1941).

In the Bridge Company proceeding, the Commission held that Alleghany was a necessary party to an application for rearrangement or modification of the control of the Bridge Company. In so holding, the Commission relied upon this Court's decision in *United States* v. *Marshall Transport Co.,* 322 U. S. 31, and stated that "failure to recognize that the public interest requires our approval of changes in the relationship of carriers constituting the system would ignore the clear intent of the Act as interpreted by our own and by court decisions." (R. 514.)

In *United States* v. *Marshall Transport Co.,* 322 U. S. 31 (1944), this Court held that the acquisition of the property and franchises of one carrier by another carrier which is controlled by a non-carrier, involves an acquisition of control of the vendor-carrier by the non-carrier for which the Commission's approval is required by Section 5 (2) (a). This Court emphasized the practical regulatory consequences of its conclusion as follows (at pp. 41–42):

> The control over the non-carrier contemplated by § 5 (3) can be acquired only if the non-carrier subjects itself to the jurisdiction of the Commission by filing its application with the Commission for its approval of such non-carrier control as is provided by § 5 (2) (b). The purpose of § 5 (3) to subject the non-carrier, thus acquiring control, to specified provisions of the Act would be defeated if the non-carrier were not to become subject to the Commission's order. * * * To approve the transaction involving such non-carrier control

> without the application of the non-carrier would be to authorize Union's non-carrier control of Marshall without subjecting the former to the Commission's jurisdiction as required by § 5 (3).

Thus, this Court recognized that the purpose of requiring a non-carrier which already controls a carrier to apply for approval of its acquisition of control, through its subsidiary, of another carrier, is to enable the Commission pursuant to Section 5 (3) to subject such non-carrier to the same reporting requirements and the same controls as to issues of securities and assumptions of liability as apply to the controlled carriers.

Following the *Marshall Transport Co.* decision in 1944, the Commission has held repeatedly that an intra-system lease or merger of subsidiary carrier properties results in the parent company acquiring a new form of control of the carriers involved as to which the parent company must apply for and obtain the Commission's approval under Section 5 (2).

In *Chesapeake & Ohio Railway Company Purchase, etc.*, 261 I. C. C. 239 (1945), Chesapeake & Ohio applied for approval under Section 5 (2) of its proposed acquisition of the properties of Norfolk Terminal & Transportation Company, all of whose stock was already owned by Chesapeake & Ohio. Alleghany filed a supplemental application seeking approval of control by it, through Chesapeake & Ohio, of the properties of the Terminal Company, and seeking approval of its continued control of Chesapeake & Ohio, Nickel Plate, and the Pere Marquette. The Commission

found that Alleghany's control (or continuance of control) of Chesapeake & Ohio, Nickel Plate, and Pere Marquette was consistent with the public interest, pursuant to Section 5 (2) (R. 184). As to the change in the mode of control of the Terminal Company, the Commission stated, 261 I. C. C., at 260–261:

> The two applications contemplate a change of existing control, in that the Chesapeake & Ohio would control, through purchase, the properties of Terminal, instead of control through stock ownership and by lease, and Alleghany's control of the two companies would likewise be changed. Such "internal rearrangement of corporate structure" must have our approval under section 5 (2) of the act, or be unlawful. *Warrior & Gulf Nav. Co. Control,* 250 I. C. C. 26, 28; *United Parcel Service of Portland—Purchase—Wiese,* 37 M. C. 473, 475, and *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.,* 15 M. C. C. 469, 471. This is true whether Alleghany's present control of Chesapeake and its affiliated companies be regarded as a lawful continuation of preexisting control or an unauthorized resumption of interrupted control.

Following the Commission's decision in the *Chesapeake & Ohio case, supra,* Chesapeake & Ohio and New York Central applied under Section 5 (2) for authority jointly to lease a portion of the line of the Nicholas, Fayette & Greenbrier Railroad Co., whose stock was wholly owned in equal parts by Chesapeake & Ohio and New York Central. Citing this Court's decision in the *Marshall Transport Co.* case, the

Commission held that Alleghany, the indirect parent company, was a necessary party to the application. *Nicholas, Fayette & Greenbrier R. Co. Lease,* 261 I. C. C. 546, 547–548 (1945). The Commission stated that—

> The Alleghany Corporation controls the Chesapeake & Ohio through stock ownership. At the hearing counsel for the Alleghany moved that its supplemental application be dismissed for the reason that that company already has been subjected to the provisions of section 20 (1–10) and section 20a (2–11) as contemplated by section 5 (3), in *Chesapeake & O. Ry. Co. Purchase,* 261 I. C. C. 239. But in *United States* v. *Marshall Transport Co.,* 322 U. S. 31, the Supreme Court of the United States held that where a carrier subsidiary of a noncarrier corporation proposed to us to acquire control of another carrier's property and business by purchase thereof, we were without authority to approve such control unless the proprietary company controlling the applicant made application to us also. The principle enunciated in that decision is equally applicable to a transaction involving control by lease. Hence, we are forced to conclude that, although it is unnecessary to act again under section 5 (3) in this proceeding, nevertheless the Alleghany is a necessary party to the instant application. The motion, therefore, is overruled.

In 1947, the Commission, acting under Section 5 (2) authorized the merger of the properties of Pere Marquette into Chesapeake & Ohio, which already controlled Pere Marquette through stock ownership.

At the same time, the Commission found that Alleghany's acquisition of control, through its control of Chesapeake & Ohio, of the properties of Pere Marquette was a transaction within the scope of Section 5 (2) and would be consistent with the public interest. Here, too, Alleghany already had indirect control of Pere Marquette. *Pere Marquette Ry. Co. Merger,* 267 I. C. C. 207.

Similarly, *in Standard Freight Lines, Inc.—Merger,* 40 M. C. C. 41 (1945), the Commission held that upon the merger of two carriers already controlled through stock ownership by an individual, he must obtain approval under Section 5 (2) of such a modification of his control. The Commission stated that "The fact that the instant merger would result only in a formal change in the manner in which Chaddick exercises his control over the properties of Bates does not negative the fact that such change in the form of his control is a transaction subject to section 5, just as the merger itself is such a transaction."

The court below refused to accord any weight to the Commission's construction of Section 5 (2), as embodied in the above cases, on the ground that "the Commission has not been consistent in holding intra-system rearrangements to be acquisitions of control, even by the immediate parent of the rearranged companies" (R. 654, 664). In fact, the Commission has been almost completely consistent on this point since 1945. The court cited *Pratt's Express Co.—Purchase—Security Warehouse Company,* 39 M. C. C. 834 (1944) and *Industrial Transport, Inc.—Lease,*

Jenks, 39 M. C. C. 823 (1944), in which the Commission's Division 4 held that Section 5 (2) did not apply to transactions which only changed the form of the parent company's ultimate control of its subsidiaries. However, the latter preceded this Court's decision in the *Marshall Transport* case; and, in any event, the Division refused to follow these decisions in the *Standard Freight Lines, Inc.*, case in 1945. Again, *United Parcel Service of Portland—Purchase—Wiese*, 37 M. C. C. 473 (1941), also cited by the court below as evidence of administrative inconsistency, was decided before this Court's decision in the *Marshall Transport Co.* case. However, it is true that in *Scott Bros., Inc.—Merger*, 45 M. C. C. 196 (1946), Division 4 approved the merger into Scott of the properties of its wholly-owned subsidiary, without requiring Scott's direct and indirect parents to apply for approval under Section 5. It is not clear whether this decision was inadvertent or whether it reflects only the fact that Scott's indirect parent, the Pennsylvania Railroad Company, was already subject to the Commission's reporting requirements and its jurisdiction over security issues.

Thus, it appears, with one possible and explicable exception, that since 1945 the Commission has consistently held that parents of carriers must seek approval of the modification of their control over their subsidiaries which results, for example, from a merger of such subsidiaries or a lease of the properties of one subsidiary to another.

The court below sought to distinguish such Commission decisions as *Pere Marquette Ry. Co. Merger*,

supra, and *Standard Freight Lines, Inc.—Merger, supra,* on the ground that in those cases it had held only that a direct parent (as distinguished from an indirect parent such as Alleghany here in relation to the Bridge Company and Big Four) must obtain approval under Section 5 (2) for the modification of its control resulting from a merger of its subsidiaries. Indeed, this distinction appears to have been crucial in the court's thinking, because it specifically refrained from setting aside the Commission's orders in the *Bridge* case insofar as they approved N. Y. Central's acquisition of a modified form of control, through ownership of the stock of Big Four, of the properties and franchises of the Bridge Company (R. 555). We submit that such a distinction is utterly unrealistic in that it would permit the really controlling parent to avoid regulation under Section 5 (3) by the simple device of creating an intermediate holding company. As this Court said in *Electric Bond & Share Co.* v. *S. E. C.,* 303 U. S. 419, 440; "That they conduct such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise". If, as we contend, the policy of the statute clearly requires that the real parent obtain the Commission's approval under Section 5 for the acquisition of a new form of control over its subsidiaries resulting from their merger, that policy cannot

be frustrated by such transparent devices. Further, the broad definition of the term "control", as used in Section 5 (2), found in Section 1 (3) (b)[4] manifests a Congressional purpose to encompass every conceivable method of exercising control within the provisions of Section 5 (2). See *United States* v. *Marshall Transport Co., supra,* pp. 38–39.

At the heart of the lower court's position is its conclusion that a non-carrier must obtain the Commission's approval under Section 5 (2) only for original acquisitions of control, and not for modifications of its existing control of carriers. As we pointed out above, in so holding the court failed to accord any weight to the Commission's contrary construction of Section 5 (2) as reflected in a consistent body of cases decided subsequent to this Court's decision in the *Marshall Transport* case. We contend that the district court's conclusion is based in large part on a mechanical reading of Section 5 (2) (a) (i) such as this Court condemned in *Marshall Transport,* is in conflict with this Court's holding in *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 22–23 (1932), and is inconsistent with the Congressional purpose in enacting the provisions of Section 5 (2).

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[4] As defined by Section 1 (3) (b), control includes:

"* * * actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and includes the power to exercise control."

The court below noted that the first clause of that subsection applies to mergers of carriers, the second where carriers purchase, lease or control the properties of other carriers, and the third to carrier acquisition of control of another carrier through ownership of stock or otherwise. It pointed out that the fourth and fifth clauses apply only where a person which is not a carrier seeks to "acquire control" of one or more carriers. From this it concluded that since Alleghany would have indirect control of the Bridge Company both before and after (pp. 653–654) the merger, Alleghany would not, as a result of the merger, "acquire control" of a carrier.

To begin with, the language of Section 5 (2) (a) (i) does not necessarily compel such a result. Its last clause provides that without the Commission's approval it shall be unlawful "for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock *or otherwise.*" The italicized language was added by Congress to make clear its intention that all forms of acquisitions of control shall require Commission approval.[5] See H. R. Rep. No. 2832, 76th Cong., 3rd Sess., pp. 68–69. But the reasoning of the court below amounts to saying that if the Commission has approved a non-carrier's acquisition of control of a carrier through ownership of the carrier's stock directly or through a subsidiary of the

[5] Significantly, the words "or otherwise" were added by the Transportation Act of 1940 which also was the source of the Section 1 (3) (b) definition of control (Appendix B, pp. 109–110).

non-carrier, it has no further jurisdiction over significant increases or modifications in the non-carrier's direct or indirect control of the carrier.

In *New York Central Securities Co.* v. *United States,* 287 U. S. 12, 22–23 (1932), the Commission had authorized New York Central to acquire control by lease of the properties of Big Four and Michigan Central which were already controlled through stock ownership by New York Central. At that time, the pertinent provision of Section 5 (2) empowered the Commission to authorize "the acquisition * * * by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving [a merger]."[6] It was there contended "that as the New York Central had already acquired control of the Big Four and Michigan Central by stock ownership, the Commission could not authorize acquisition of control by lease." In rejecting this contention, this Court looked to legislative purpose, as follows:

> * * * The question is not of the extent of the control, provided it stops short of "consolidation," but of the public interest in having the control maintained. The public interest is served by economy and efficiency in operation. If the expected advantages are inadequately secured by stock ownership and would be better

[6] Title II of the Emergency Railroad Transportation Act of 1933 combined this paragraph, the then paragraph (6) governing consolidations, and certain additions into one comprehensive paragraph, which is substantially the present Section 5 (2). See S. Rep. No. 87, 73rd Cong., 1st Sess., p. 9; H. R. Rep. No. 193, 73rd Cong., 1st Sess., pp. 15–16.

> secured by lease, the statute affords no basis for the contention that the latter may not be authorized although the former exists. The fact that one precedes the other cannot be regarded as determinative if the desired coordination is not otherwise obtainable. The disjunctive phrasing of the statute "either under a lease or by the purchase of stock" must be read in the light of its obvious purpose and cannot be taken to mean that one method must be exclusive of the other.

Similarly, in the instant case, the question is whether the Congressional scheme is furthered or defeated by the holding of the court below that a modification of a non-carrier's indirect control of a carrier does not require approval by the Commission.

The legislative history of Section 5 strongly supports the Court's conclusion in the *New York Central Securities* case and the Commission's decision here. When Congress used the terminology "acquisition of control" in Section 5 (2), it was aware that the Commission had interpreted the words to apply to modifications of previously existing control, as demonstrated by the *Preliminary Report of Study of Railroad Consolidations and Unifications,* 71st Cong., 3rd Sess., issued by the Senate Committee On Interstate Commerce in 1931. In that report it was stated (p. 119) that of 347 acquisitions of control under Section 5 (2) between March 1, 1920, and October 31, 1930, 110 represented leases of subsidiaries or of subsidiaries of other members of the same system, 18 represented operating contracts with subsidi-

aries, and 39 consisted of "acquisitions of control of carriers (reorganizations, further control, etc.) which were subsidiaries or members of the system of the acquiring carrier prior to acquisition or which were constructed during the year of acquisition." It is to be presumed that Congress used the words in the light of this interpretation.

We do not propose to further discuss the legislative history at this point in our brief and respectfully refer the Court to our discussion in Point II at pages 49–52 and, especially, to Appendix B, where the legislative history is set forth in detail. It is sufficient for present purposes to state that the history shows that in enacting Section 5 (2) Congress intended to subject to Commission approval every form of combination of railroad properties, and to subject to Commission regulation any agency which engages in a transaction affecting railroad combination, whether the transaction results in combining railroad properties previously separate or in modifying an existing combination.

As this Court pointed out in the *Marshall Transport Co.* case, *supra,* the purpose in requiring a non-carrier to apply for approval of its original acquisition of control, through a subsidiary carrier, of another carrier, is to enable the Commission pursuant to Section 5 (3) to subject such non-carrier to the same reporting and accounting requirements and the same controls as to issues of securities and assumptions of liability as apply to the controlled carriers. Thus, it is clear under the rule of that case that if New York Central (or one of its subsidiaries)

acquired control through stock ownership of a previously unaffiliated carrier (no matter how small) Alleghany, as a non-carrier, must apply for approval of its acquisition of control over such carrier. Yet, under the decision below, the merger of major carrier subsidiaries would not require parent holding companies, direct or indirect, to submit themselves to the Commission's jurisdiction under Section 5 (3).

We contend that when there is proposed a significant increase or modification in a non-carrier's direct or indirect control of a carrier, the purposes of Section 5, and paticularly Section 5 (3), require that the non-carrier seek the Commission's approval under Section 5 (2). As illustrated in the Commission decisions discussed above, such increases or modifications of control involve much more than mere intra-system bookkeeping transactions. An increase in the existing stock control of a carrier may enable its direct or indirect parents to bring about corporate acts by the carrier which were impossible under the prior control. The merger of two carrier subsidiaries of a carrier or non-carrier parent has significant consequences in corporate, tax, and bankruptcy law. Moreover, under the Interstate Commerce Act, rail carriers, even though controlled through stock ownership by a common parent, retain independent obligations and duties to shippers, and to other carriers in such important matters as rates and routing under Section 3 (4).[7]

[7] For an example of conditions for the protection of shippers and other carriers which the Commission has imposed in approving acquisition of control through stock ownership of a railroad, see *Acquisition of Control by Wabash R. Co.*, 154 I. C. C. 155, 162–163 (1929).

The modification or termination of such obligations following a merger affects the interests of the public and other carriers. Indeed, a merger presumably means an end to the possibility that the merged carrier properties may be operated independently. Thus, after Chesapeake & Ohio acquired control through stock ownership of Pere Marquette and Nickel Plate, the merger of Pere Marquette into Chesapeake & Ohio marked the disappearance of the former as a carrier; in contrast, a few years later Nickel Plate had become an independent carrier competitive with Chesapeake & Ohio. In brief, contrary to the apparent view of the court below, the Commission's construction of Section 5 does not result in hinging the significant decision of whether a non-carrier shall be considered as a carrier upon irrelevant or insignificant events.

We contend elsewhere that the acquisition of control of an integrated carrier system by a non-carrier which controls no other carriers does not require approval under Section 5 (2). Nevertheless, the merger or other rearrangement or modification of control of the carrier subsidiaries in such a system may well reflect a change in the management or policies of the non-carrier parent which would justify the Commission in determining for the first time that the non-carrier should be regulated as a carrier for the purposes of reporting and security issues. When such changes are proposed, it is therefore important that the Commission have an opportunity to determine anew under Section 5 (3), in the light of changed conditions, the extent to which the non-carrier should be considered

as a carrier for the purposes of Sections 20 and 20a. Such occasions for reconsidering the status of a non-carrier parent arise not only where, as here, the Commission has held that the non-carrier's acquisition of control of an integrated carrier system did not require approval under Section 5 (2), but also where such control antedated Section 5,[8] or where such approval was sought and obtained but without a further determination under Section 5 (3) that the non-carrier should be considered as a carrier. The Commission's view of its jurisdiction under Section 5 (2) and (3) is necessary to insure that it will possess full and continuing power to scrutinize and regulate the relationships between non-carriers which control two or more carriers and such controlled carriers.

The Effect of the Boston and Albany Proceeding. We should also point out that in *Boston and Albany Railroad Co. Control* (R. 450–473), decided March 22, 1955, Division 4 approved the proposed acquisition of control of Boston and Albany, and two other railroads, by New York Central through stock ownership and by Alleghany through its control of New York Central. The properties of these railroads were already leased to New York Central, but neither

[8] There is pending before the Commission, in Finance Docket No. 4845, an application by the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway for authority to merge. L. & N. has controlled through stock ownership N. C. & St. L., and has itself been controlled by the Atlantic Coast Line Railroad Co., since prior to the enactment of Section 5. The Atlantic Coast Line Railroad Co., and its non-carrier parent, the Atlantic Coast Line Co., both have joined in the merger application.

Alleghany nor New York Central owned stock in any of the three railroads, except that New York Central owned about 16% of the stock of one of them. Under the *Marshall Transport Co.* case, Alleghany clearly was required to obtain approval under Section 5 (2) for its acquisition of control over these three railroads. In its report and order in the Boston & Albany proceeding, the Division made no new provision as to Alleghany's status pursuant to Section 5 (3), but noted that "In our order [in the *Bridge Company* case decided by Division 4 20 days before], we held that Alleghany should continue to be considered a carrier subject to the provisions of Section 20 (1) to (10) and Section 20a (2) to (11). (R. 453). Reading together the Commission's reports in the *Bridge Company* and *Boston & Albany* cases, it is impossible to escape the conclusion that the Commission would have made such a determination with respect to Alleghany in the *Boston & Albany* case except for its assumption that it had validly done so already in the *Bridge Company* case. The district court denied Alleghany's motion for a new trial to take into account the Boston & Albany transaction. (R. 675–678.) However, if as we contend, the district court is wrong in its view that such a determination could not be made in the Boston & Albany proceeding unless the Commission approved under Section 5 (2) Alleghany's acquisition of control of New York Central, then a fair reading of that case results in Alleghany being subject to Section 20a

and, therefore, in subjecting Alleghany's issue of new preferred stock to the Commission's jurisdiction.[9]

II. The Commission's jurisdiction to approve the modification of Alleghany's control of the Bridge Company was not affected by its lack of, or failure to exercise, jurisdiction over Alleghany's acquisition of control of the New York Central System

The entire Commission held, in its report of May 24, 1955 (R. 511–514), that Alleghany's acquisition of control of New York Central Railroad Company in

[9] In the district court, some of the appellants contended, as an alternative basis for the Commission's jurisdiction under Section 20a to approve Alleghany's preferred stock exchange, that the Commission's order of June 5, 1945, in *Chesapeake & Ohio R. Co. Purchase*, 261 I. C. C. 239 (R. 185), which provided that "unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20a (2) to (11), inclusive * * *", continued in effect. In its report of March 2, 1955 (R. 424), Division 4 concluded as follows:

"* * * Without our further order, the voluntary action of Alleghany on and after January 19, 1954, divesting itself of its stockholdings and control of Chesapeake, and removing from deposit in the voting trust agreements, the controlling holdings of other carriers' stocks and disposing of such holdings, could not operate to alter the status of Alleghany as a carrier subject to the Act.

"The foregoing analysis is premised upon the theory that Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change. To find otherwise would disregard the language of the report and order in the *Chesapeake case*: * * *."

In addition, Section 15 (2) of the Interstate Commerce Act provides that:

"Except as otherwise provided in this part, all orders of the Commission, other than orders for the payment of money, * * *, shall continue in force until its further order, or for a specified

May, 1954, did not involve the acquisition of control of more than one carrier, although New York Central controls through stock ownership or otherwise the carrier corporations or properties listed in the Appendix to Division 4's order of March 2, 1955 (R. 444–446).

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period of time, according as shall be specified in the order, unless the same shall be modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Thus, the appellants contended that both under the terms of the order of June 5, 1945, and by virtue of Section 15 (2), that order remained in effect until revoked to subject Alleghany to the Commission's jurisdiction under Sections 20 and 20a.

The district court held, to the contrary, (1) that "From the instant of Alleghany's relinquishment of control of the C. & O. and the Nickel Plate" it automatically ceased to be subject to regulation by the Interstate Commerce Commission (R. 615), and (2) that Section 15 (2) "relates solely to rate orders or the like" (R. 655).

The Commission did not appeal on the question as to the continuing effect of the 1945 order. We have some doubt as to whether, where the factual basis for an order has disappeared, the order can be regarded as continuing in effect indefinitely until specifically revoked, regardless of the legal or practical consequences of such continued effectiveness. However, we feel obliged to state that we do not agree with the views of the district court. We believe that an order, such as the order of June 5, 1945, continues in effect, even after its factual basis is alleged to have disappeared, for at least a reasonable period to enable the Commission, either on its own motion or that of interested persons, to determine whether the order should be terminated, *e. g.*, whether the facts have changed as alleged. It is inconceivable that Congress intended persons subject to a wide variety of orders to determine for themselves when such orders had become obsolete and no longer required compliance. Moreover, when Alleghany joined in the application under Section 5 (2), following the Commission's order that it show cause why the status order of June 5, 1945, should be revoked, it was simply common sense to keep

The district court held, to the contrary, "that where a non-carrier acquires control of the parent corporation of a railroad system it acquires control of the subsidiaries and consequently of 'two or more carriers' so as to require I. C. C. approval" (R. 618). Thereupon, apparently, the court held that Alleghany's failure to obtain approval under Section 5 (2) of its acquisition of control of the New York Central system deprived the Commission of power to act upon Alleghany's application for approval of modification of its control over the Bridge Company (R. 672–673). We submit that both of the conclusions of the court below are erroneous.

A. Alleghany's acquisition of control of an integrated carrier system consisting of New York Central and its subsidiaries was not an acquisition of control of two or more carriers which required Commission approval under Section 5 (2) (a) (i) of the Interstate Commerce Act

As the Commission found (R. 511), the New York Central Railroad Company "is the parent company of the New York Central Railroad system, comprised of numerous carriers including several railroad systems and the railroads and properties controlled and operated by those companies under lease or otherwise." After summarizing the development of the New York Central system as an "integrated unit",

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the prior order in effect until the application was determined; otherwise, during such a hiatus, Alleghany would have been able to change its capital structure without the Commission's approval. Secondly, we submit both as a matter of statutory construction (*Railroad Trainmen* v. *B. & O. R. Co.*, 331 U. S. 519) and on authority (*Chicago Junction Case*, 264 U. S. 258, 270; *Minneapolis & St. L. R. Co.* v. *Peoria & P. U. R. Co.*, 270 U. S. 580) that Section 15 (2) is not limited to rate orders but also applies to orders issued under Section 5 (2).

the Commission found that "When Alleghany, by stock ownership and by the favorable action of the stockholders acquired control of Central, all the properties within the carrier's orbit were under long established single operating control" (R. 512). Turning to the American railroad system generally, the Commission pointed out (R. 512) that:

> The consolidation and integration of separate railroad properties, most of them having originated as small or short lines, has been largely responsible for the development of the present great network of rail transportation in this country. It has enabled transportation service to respond to the expanding needs of commerce. Experiences in the early history of the country, dating back to colonial times, indicated the absolute necessity of removing all unnecessary impediments to the movement of traffic, so that it could always be continuous from origin to destination. * * *.
>
> One of the oustanding characteristics of this process of consolidation and integration has been the formation of so-called family lines or systems of railroads—that is, separate railroad properties functioning as unified systems under common control and management.

In other words, practically every significant railroad in the United States (and many motor carriers) consists of a parent corporation and subsidiary corporations whose separately owned properties have been integrated for operating purposes through leases and other devices. Under the decision below, every shift of control of such a carrier or carrier system to iden-

tifiable persons would require the Commission's approval and authorization under Section 5 (2).

The Commission's determination as to what constitutes a "carrier" for the purposes of Section 5 (2), based as it was upon a detailed knowledge of the operations and corporate structures of rail, motor and water carriers and experience with hundreds of proceedings under Section 5, is entitled to considerable weight. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111; *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504. At the very least, the problems visualized by the Commission under the decision below require analysis of the purposes of Section 5 as revealed in its considerable legislative history. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 542–543.

In Appendix B to this brief, we have summarized or quoted those portions of the extensive legislative history of Section 5 which, in our view, throw the most light on the issues involved in this case. That history portrays a legislative effort to secure for the country a national transportation system economically run and adequate to meet its needs, by encouraging the voluntary unifications of railway properties under conditions which would maintain existing routes wherever possible and promote economies in operation, while preserving constructive competition. The Interstate Commerce Commission was delegated the task of supervising this ambitious program.

Initially, as reflected in the Transportation Act of 1920, it was the purpose of Congress to require all

consolidations to conform to a comprehensive consolidation plan to be promulgated by the Commission, while permitting acquisitions of control short of consolidation where the Commission found them to be in the public interest. (Appendix B, *infra,* pp. 84–86). By the Emergency Railroad Transportation Act of 1933, Congress extended the requirement of conformity to a master plan to all combinations, both consolidations and combinations of a less permanent nature (Appendix B, *infra,* pp. 90–91). Finally, experience dictated abandonment of the requirement of conformity to a plan, and the Transportation Act of 1940 permitted combinations, subject to certain conditions, where the Commission found them to be just and reasonable and consistent with the public interest (Appendix B, *infra,* pp. 109–110). Always, however, it remained the intention of Congress that railroad combinations should be under the supervision and control of the Commission.

Thus, when the Commission informed Congress that through the holding company device combinations were being effected without Commission approval (Appendix B, *infra,* p. 87), and the ensuing Congressional investigation verified the fact (Appendix B, *infra,* pp. 87–89), Congress acted quickly to remedy the situation in Title II of the 1933 Act, the so-called "holding company bill." The loophole was plugged by language in new paragraph (4) of section 5, making it lawful, with Commission approval, "for a corporation which is not a carrier to acquire control of two or more carriers * * * or for a corporation which is not a carrier and which has control of one

or more carriers to acquire control of another carrier * * *" (48 Stat. 217). As a precondition to approving the acquisitions of control, the Commission was directed to find "that the proposed * * * acquisition of control will be in harmony with and in furtherance of the plan for consolidation of railway properties" (*Ibid.*), an obviously meaningless requirement if the statute were meant to apply to simple transfers of control of carrier systems lacking any element of unification.

Further, new paragraph (6) made it "unlawful for any person, except as provided in paragraph (4), *to accomplish or effectuate* * * * the control or management in a common interest of any two or more carriers * * *" (48 Stat. 218). Congress intended thereby to make unlawful all combinations not authorized by the Commission. See S. Rep. No. 87, 73d Cong., 1st Sess., p. 9; H. R. Rep. No. 193, 73d Cong., 1st Sess., p. 16. By its very terms, the provision relates solely to transactions which affect unification. This is a clear indication that it was not the purpose of Congress to require Commission approval of transfers of control over existing combinations of carriers, transactions which it failed to make unlawful absent approval.

The background and purpose of the above provisions force the conclusion that they were enacted for the purpose of subjecting holding companies and like non-carriers to Commission control whenever they engage in transactions affecting a combination of carriers. This purpose is stated again and again in

the testimony of Dr. Splawn and Commissioner Eastman, in the Congressional reports, and in the debates, which we have excerpted (Appendix B, *infra*, pp. 93–109).

The legislative history reflects a second concern shared by the Commission and by Congress with respect to holding companies, a concern with respect to their financial practices. The three volume "Splawn Report", *Regulation of Stock Ownership in Railroads*, H. R. Rep. No. 2789, 71st Cong., 3rd Sess., contained extensive data on the organization and financial operations of the principal railroad holding companies at the time, although it recommended no legislation aimed at financial regulation. However, as pointed out in our summary of the legislative history (Appendix B, *infra*, p. 89), the Commission, following publication of the Splawn Report, suggested the need for such legislation. See 45 I. C. C. Ann. Rep. 85–86 (1931).

The holding company bill met the need by providing in new paragraph (5) that non-carrier corporations authorized under paragraph (4) to acquire control of carriers shall, to the extent provided by the Commission, be considered as carriers subject to the provisions of section 20, relating to reports and accounts, and to the provisions of section 20a, relating to issuance of securities and the assumption of liabilities (48 Stat. 217–218) (Appendix B, *infra*, pp. 90–91).

It may be argued that these provisions reveal a Congressional intent not to permit outside control of carriers without subjecting to Commission regulation

the financial operations of the controlling party, and that such regulation should not be made to depend upon whether or not the acquisition of control affected unification. But, if this is so, why is control of a single carrier by a non-carrier left free from regulation under Section 5? And, why are not the financial operations of one acquiring control of a single carrier subject to regulation under Sections 20 and 20a? We submit that the legislative history discloses an intent to empower the Commission to regulate the financial operations of the non-carrier whose acquisition of control brings about a combination of carriers, or modifies an existing combination, but not to extend that power to the non-carrier whose activities in no way enhance or change existing combinations of carriers.

Our position is underscored by another aspect of legislative history. The Splawn Report, H. R. Rep. No. 2789, *supra*, contained a recommendation "that at the next session of Congress the committee shall give consideration to whether or not legislation is necessary to deal with any past acquisitions of railroad properties such as are disclosed in this report, and which have not had the approval of the Interstate Commerce Commission as being in the public interest" (Appendix B, *infra*, p. 89). In apparent response to this recommendation, the holding company bill originally contained a proposed paragraph (6) which empowered the Commission to require divestiture of the stock of any carrier acquired without Commission approval after passage of the Transportation Act of 1920, where the Commission found, after hearing, that

such stock holdings were likely to hinder the consolidation plan or impair the mutual independence of the systems provided for in the plan, by reason of subjecting such carrier to the control, domination or influence of another carrier. See H. R. 9059, 72d Cong. 1st Sess. This feature of the bill came under heavy attack in the course of the hearings.

Although there was apparently much confusion, and perhaps misapprehension, with respect to the effect of the divestiture proposal, its opponents shared the fear that it conferred upon the Commission the power to say who should and who should not own stock in railroads. Congressman Beck, the leading opponent of the measure in the Committee, articulated this fear as follows (Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9059, 72d Cong., 1st Sess., p. 75):

> * * * That, in the last analysis, means the Commission wants the power to say who shall be the stockholders of the railroads in the United States, not in future, but retroactively. It is, of cource, the broadest claim of power of which I have any knowledge, because its implications are infinite, and it portends something, in my judgment, because it constitutes your commission of 11 men, as I have said, the judge as to who shall be the stockholders. If it applies to holding companies, it should equally apply to individuals.

Former Commissioner Potter, a witness, expressed the view that passage of the measure would commit Congress to the proposition that it "has the right to

say who shall own the oil wells in Texas * * * who shall raise hogs * * * who shall own the automobile factories in the country." Hearings on H. R. 9059, *supra*, p. 150.

In answer to this criticism, Dr. Splawn submitted a written statement as follows (*Id.* at p. 281):

> The remaining points on constitutionality relate, as I have stated, to paragraph (6), the provision for divestment of stock.
>
> There has been much confusion introduced into the discussion of this paragraph by reason of failure to recognize how closely it is related to the consolidation plan. It has been contended that the bill should be called "a bill to regulate the ownership of stock in railroads," implying that it contains provisions for arbitrary regulation of stock ownership, and ignoring the fact that the respect in which stock ownership in railroads is sought to be controlled is exceedingly narrow and closely tied up with the basic purpose of preventing the defeat of the consolidation plan. It is further argued that the logical result of doing what Congress proposes to do in this bill would be to permit Congress to say who may own oil wells and who may engage in other private enterprises. Also, it has been urged that Congress has no power to determine, or to give to the Interstate Commerce Commission the power to determine, whether it is in the public interest for an individual or a corporation not a railroad, to own the stock of a railroad.
>
> These arguments have no application to the bill, because it contains no such sweeping and arbitrary provisions. Therefore, much if not

> all of their force is lost. Actually, the bill provides for divestment only in cases where the holding of stock is or is likely to be the cause in whole or in part of preventing or hindering the carrying out of the consolidation plan or impairing the independence of the systems provided for in such plan, by reason of subjecting one carrier to the control, domination, or influence of another carrier.

Nevertheless, Congress heeded the cries of alarm, and divestiture was scrapped in favor of restriction of voting power of stock by deposit with a trustee or other appropriate means (48 Stat. 219).[10] In so doing, Congress displayed a sensitiveness to the charge that it was undertaking to empower the Commission to approve or disapprove acquisition of a controlling interest in a railroad, *per se,* and rejected the notion that it had any such intent.

Today, Section 5 (2) (c), (d) and (f) directs the Commission to consider the effect of a failure to include other railroads involved in a Section 5 (2) transaction, to require their inclusion when the public interest requires, and to provide certain protection for employees. While of crucial importance in the case of the combination of railroad properties, these factors are otherwise without significance. Of importance in connection with unifications, such as the merger of Bridge into Big Four, they have no function in connection with the transfer of control of the existing New York Central system to Alleghany. The singular lack of appropriateness of these provi-

[10] See Appendix B, *infra*, p. 91, fn. 9.

sions with respect to an acquisition of control involving no element of unification further indicates that such a transaction is not within the compass of Section 5 (2).

In brief, nothing in the history of Section 5 contains the slightest indication that Congress intended to require the Commission's approval as a prerequisite to an acquisition or transfer of control over an existing, integrated railroad system. Rather, the entire emphasis is upon subjecting to regulation transactions which will bring additional carriers under a common control, or which will modify existing arrangements by which two or more carriers are controlled in a common interest.

Moreover, the practical consequences of this aspect of the decision below confirm the clear indication of the legislative history that it is erroneous. The entire Commission stated that (R. 512):

> To give section 5 an interpretation which would require our approval each time stockholders decide to change directors of established system properties, or to elect new officers, and, consequently, to install new management would have a tendency to set in motion within the organizations contending forces which might well impair or destroy the results of legitimate integration. Although Congress has subjected the merging of railroad properties in many respects to regulation in order to prevent abuses and to protect the public interest, we do not believe it intended for Section 5 to be construed in a way that might produce undesirable results.

To this view of the Commission, the district court replied, in its Opinion Granting Application For Temporary Injunction, (R. 618):

> * * * The attendant difficulties conjured up by the Commission are greatly exaggerated. Without undue trouble it should be able to distinguish the usual proxy contest from the acquisition of holdings by a single person or corporation of such a block of stock that it has taken control from the other stockholders.

Assuming, *arguendo,* the applicability of Section 5 (2), it is utterly unrealistic to say that it applies only to acquisitions of control by a single individual or corporation who has purchased a controlling block of stock. Indeed, under the district court's view, it would seem clear that neither Alleghany nor any single individual or corporation was in the position of acquiring control of New York Central, since a vigorous proxy battle was necessary to bring about a change in the control and management of New York Central. Rather, the purposes of Section 5 clearly require that it apply, where it applies, to joint acquisitions of control by an identifiable group of persons acting in concert. The Commission has repeatedly treated transactions of a type subject to Section 5 (2) as requiring its approval even when brought about by several persons acting jointly. *Sewell Valley R. Co. et al. Joint Control,* 158 I. C. C. 673 (1930); *Nicholas, Fayette & Greenbrier R. Co. Lease,* 261 I. C. C. 546 (1945).

As noted above, many railroad systems consist of a parent company and subsidiary corporations under

unified management and performing an integrated transportation service. Many of these railroad systems are so large that attempts by a single individual or corporation to acquire control of them through outright acquisition of a controlling block of stock are extremely rare. The existing management's control of the proxy machinery means that an outsider seeking to acquire control must either spend a huge sum in purchasing voting stock or engage in a proxy battle. In recent years, proxy battles have resulted in changes of the management of New York Central, New York, New Haven & Hartford R. R. Co., and the Minneapolis & St. Louis R. R. Co. The New Haven, like New York Central, consists of a parent company and subsidiary corporations. It is our understanding that control of the New Haven was acquired by an identifiable group of persons who succeeded in combining with their own shares enough proxies from other stockholders to replace the existing management. If, as the court below held, the Commission were required to approve or disapprove such an acquisition or shift of control, the following practical problems would arise.

The Commission's approval of such an acquisition or shift in the control of an integrated carrier system must take place either before or after the stockholders meeting. If persons desiring to obtain control of such carrier, at least in part, by means of a proxy contest apply for the Commission's approval in advance, they may be confronted with a contested proceeding before the Commission which will last beyond the stockholders

meeting. Moreover, the uncertainties created by the pendency of such a proceeding presumably would be a heavy handicap in carrying on a simultaneous solicitation of proxies. Also, the Commission would be required to act upon applications for approval of proposed acquisitions of control which might be unsuccessful in any event.

If the Commission's approval is sought for an acquisition or shift of control following a successful contest for proxies by an outside group, the Commission would then be in the position of approving or disapproving a new management selected by the stockholders.

Of course, the Commission and everyone else concerned must face these practical problems when a non-carrier which already controls one or more carriers (or a carrier) seeks to acquire control of another carrier. Where there is involved unification or combination of carriers not previously under common control, Congress intended to subordinate stockholders' preferences to the public interest. Where, as in Allegheny's acquisition of control of the New York Central system, there is no new combination or unification of carriers, we do not believe that Congress intended the Commission to decide who should be permitted to control or manage an already integrated railroad system.[11]

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[11] The district court cited in both of its opinions (R. 618, 673) the decisions of Division 4 in *Weinstein—Control—Capital Transit Company and Montgomery Bus Lines*, 56 M. C. C. 127 (1949), and *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689 (1946), as holding that where a non-carrier obtains control of an integrated carrier system consisting of a parent company and subsidiaries, it acquires control of "two or more

B. The Commission's jurisdiction over Alleghany under Section 5 (3) was supported by the fact that Alleghany controlled New York Central, even if such control should have been but was not authorized under Section 5 (2)

In the *Bridge* case, the Commission asserted jurisdiction over Alleghany under Section 5 (3) on the ground that Alleghany, a non-carrier, had control of one carrier, New York Central, and was seeking approval under Section 5 (2) for a modification of its control of the Bridge Company (R. 515). Seemingly as a separate ground for its decision, the district court held that since Alleghany did not obtain the Commission's approval of its acquisition of control of New York Central, the Commission could not take into consideration the fact that Alleghany controls New York Central. That is, the district court apparently held that only approved acquisitions of control may be counted in determining whether a non-carrier controls one or more carriers (R. 655). We contend that this

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carriers" within the meaning of Section 5 (2) (a) (i). Apart from the fact that these were not decisions of the entire Commission, it should be noted that the *Seaboard* case involved a transfer of control over rail carriers and of joint control of a water carrier (through ownership of 50 percent of its stock); we understand that the water carrier was not part of an integrated transportation enterprise. In the *Weinstein* case, it is not clear whether attention was focused on that problem or whether the carriers involved were performing an integrated transportation service. It similarly cited in its later opinion *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254 (1952) as holding that the purchase of the stock of four small railroads from a corporation which controlled them required approval under Section 5 (2). However, these were scattered short lines which were not operated as an integrated enterprise.

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conclusion is without merit and would frustrate the clear purposes of the Act.

Assuming, *arguendo,* that Alleghany was required to obtain the Commission's approval under Section 5 (2) of its acquisition of control of New York Central, it by no means follows that the Commission lacked jurisdiction, when Alleghany proposed to engage in another transaction of a type covered by Section 5 (2), to approve or disapprove the later transaction and, if it approved, to subject Alleghany, pursuant to Section 5 (3), to regulation as to reports, accounts and security issues. Certainly the Congress did not so provide. Nothing in the Act remotely suggests that only *approved* control of carriers by a non-carrier will serve as the basis for subjecting a non-carrier to regulation as a carrier. If Alleghany has acquired control of New York Central illegally, there are other remedies, such as those provided by Section 5 (7) and (8), to deal with that situation more appropriately than by the conclusion below that Alleghany may not be regulated at all.

Clearly, the public concerns reflected in the language and history of Section 5 compel the conclusion that the Commission had the power to subject Alleghany to such regulation, regardless of whether the Commission should have gone further to determine whether Alleghany should be permitted to acquire control of New York Central at all. See, particularly, *Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38, 41–43. The Commission has so held not only in the

instant case but also in *Chesapeake & Ohio Ry. Co. Purchase, etc.*, 261 I. C. C. 239, 260–261 (1945). We submit that the correctness of this view would be even more obvious if, in this case, Alleghany were challenging rather than acquiescing in the Commission's assertion of jurisdiction over it in the *Bridge* case. In either posture, we submit that the Commission correctly applied Section 5 (2) and (3) upon the basis of Alleghany's factual control of New York Central.

III. The Commission proceedings were free from procedural defects

In Appendix II of its second opinion, the district court concluded that the Commission orders determining that Alleghany controlled Central were invalid because (1) the findings as to Alleghany's control of Central are insufficient and unsupported by the evidence and (2) the appellees were deprived of an evidentiary hearing on the issue of control (R. 670). We contend that the Commission's findings on this issue were adequate and that its refusal to accord the appellees an evidentiary hearing was a sound exercise of the discretion conferred upon it by section 5 (2) (b).

A. The Commission's finding with respect to Alleghany's control of Central was adequate and was supported by adequate evidence

Division 4 stated in its report that "We recognize that the present control of the Central system has passed to Alleghany by regular corporate procedures * * *" (R. 435). The Division's conclusion

was based upon the following subordinate findings (R. 417):

> The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint-venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 per cent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice-president of Alleghany holds a similar position with Central.[12] * * * When Alleghany, by stock ownership and by the favorable action of the stockholders acquired control of Central * * * (R. 511–512).

The full Commission stated in its report:

> The contention that Alleghany does not control the individual directors on Central's board

[12] The evidence of record supporting these findings may be found in the sworn joint application of The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Louisville & Jeffersonville Bridge and Railroad Company, Central, and Alleghany, filed with the Commission on September 20, 1954 (R. 210, 217–218, 234). Indeed, as we point out later (*infra*, p. 71, fn. 18), the appellee Breswick & Co. was contending before the Commission as of February 4, 1955, that Alleghany had acquired control of New York Central (R. 322).

> ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly, the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central (R. 513).

The district court characterized these findings as "very oblique" (R. 621). Noting that Division 4 had referred to control by "Alleghany and its officers" and that the entire Commission referred to control by "Alleghany and its allied interests," the district court held in substance that "the findings do no more than say that Alleghany, with someone else, controls New York Central" and are, therefore, insufficient (R. 623–624).

In determining corporate control, the Commission must make a realistic appraisal of the facts in light of its experience as an expert body familiar with the realities of carrier control relationships. Moreover, the Interstate Commerce Act reflects a disposition to construe control broadly in order to give the Commission jurisdiction where control or the power to exercise control exists in fact, regardless of how that control may be exerted.[13]

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[13] Having the benefit of this Court's broad interpretation of "control" in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, Congress incorporated this definition in section 1 (3) (b) through the agency of the Transportation Act of 1940. See Appendix B, this brief, *infra*, p. 110. In the *Rochester* case, the Court upheld a determination by the Federal Communications

To that end, section 1 (3) (b) provides:

> For purposes of sections 5 * * * where reference is made to control (in referring to a relationship between any person or persons and another person or persons) such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

Commission that it had jurisdiction over a telephone company by virtue of the control of that company by another and said (pp. 145–146):

"The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining 'control' of one company by another, Congress did not imply artificial tests of control. This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one-third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.'" *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286–287; *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, 303, *et seq.*

Section 1 (3) (a) defines the term "person" as including "an individual, firm, copartnership, corporation, company, association, or joint-stock association * * * trustee, receiver, assignee, or personal representative thereof."

We think that there can be no doubt that Alleghany gained the power to exercise control over Central and that it, in fact, secured actual control by virtue of its success in the much-publicized proxy fight preceding the stockholders' meeting of May 26, 1954, a fact well-recognized by the public at the time.[14] Nor can the categorical statements in the reports of Division 4 and of the entire Commission leave any doubt that the Commission found Alleghany to be in control of Central.[15]

B. The Commission was not required to accord appellees an evidentiary hearing

The pertinent hearing provision (section 5 (2) (b)) provides:

> Whenever a transaction is proposed under subparagraph (a) * * * the Commission * * * shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and *a public hearing shall be*

[14] See N. Y. Times, June 12, 1954, p. 1, col. 8; *How Young Got the Votes*, Fortune, August 1954, p. 87.

[15] The fact that the findings were made in narrative form does not impair their sufficiency. *Alabama, G. S. R. Co.* v. *United States*, 340 U. S. 216, 227.

> *held in all cases where carriers by railroads are involved unless the Commission determines that a public hearing is not necessary in the public interest.* [Emphasis added.]

Acting in accordance with its understanding that the quoted provision vests it with discretionary power to dispense with a hearing (see *O. C. Wiley & Sons* v. *United States*, 85 F. Supp. 542, 545 (W. D. Va.), aff'd 338 U. S. 902), the Commission determined that a public or evidentiary hearing was not necessary.[16]

In reaching the conclusion that the Commission was required to conduct an evidentiary hearing, the district court drew on language in section 5 (2) (b) ("the Commission * * * shall afford reasonable opportunity for interested parties to be heard") and in section 17 (3) ("All hearings before the Commission * * * shall be public upon the request of any party interested.") and deduced that while the Commission may have discretion to omit a "public hearing", "there can be a non-public hearing under Sec. 5 (2) (b) at which 'interested parties' must have a 'reasonable opportunity to be heard'" (R. 671). This is an elaboration of the court's reasoning in its first opinion, in which it treated the 5 (2) (b) provision affording "reasonable opportunity for interested parties to be heard" as a "mandatory direction" that

[16] Using the words of the statute, Division 4 stated its opinion that "a public hearing is not necessary in the public interest" (R. 416). The entire Commission concluded that as the appellees were primarily concerned with the interpretation and application of section 5 (2) and (3), "there is no need to order a hearing".

a hearing [17] be held and added that the "public hearing referred to is something quite different from merely hearing the interested parties" (R. 627). Thus, the district court interpreted section 5 (2) (b) as requiring an evidentiary hearing on all transactions proposed under subparagraph (a), but vesting in the Commission discretion as to whether such hearing shall be held in public or in private.

We submit that the distinction between public and nonpublic hearings introduces a novel concept into the administration of the Interstate Commerce Act for which no rational basis can be found. As we read section 5 (2) (b), the first sentence is concerned solely with notification when a transaction is proposed under subparagraph (a). The hearing provisions come next, providing, in so many words, that the Commission shall hold a public hearing if it shall consider it necessary in order to make the required findings, and that where rail carriers are involved, it shall hold a public hearing unless it determines the public interest does not so require. By "public hearing" is meant the usual formal hearing for the taking of evidence which is open to the public. In merely stating that interested parties may require hearings to be public, sec-

[17] The court's reliance on sections 5 and 7 of the Administrative Procedure Act (R. 625–626) makes it clear that it is referring to an evidentiary hearing. The cited passages, being solely concerned with prescribing procedures to be followed where an evidentiary hearing is required by statute, are irrelevant where the issue, as here, is not how such a hearing should be conducted but whether it is required at all. The same may be said with respect to the court's reference to the Commission's Rules of Practice (R. 670–671).

tion 17 (3) does not purport to say whether or not an evidentiary hearing must be held and has no relevance to the determination of that issue in a section 5 (2) proceeding.

The legislative history leaves no doubt that Congress intended the Commission to have discretion to dispense with a hearing. Until 1949, the hearing provision in section 5 (2) (b) stated flatly that "a public hearing shall be held in all cases where carriers by railroad are involved." The Commission found that the mandatory requirement, which made it necessary to schedule hearings and assign examiners to take evidence in all cases involving railroads, whether or not a hearing was necessary or desirable, was wasteful of time and money. See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 1710, 81st Cong., 1st Sess., pp. 17–18. Consequently, it requested Congress to remove the requirement. *Ibid.*; 61 I. C. C. Ann. Rep. 147 (1947).

Congress responded in the Act of August 2, 1949 (63 Stat. 485) adding the clause "unless the Commission determines that a public hearing is not necessary in the public interest." Both the House and Senate reports accompanying the bill quote from a letter of the Commission's legislative committee in explanation of the purpose of the added clause as follows (S. Rep. No. 82, 81st Cong., 1st Sess., p. 3; H. R. Rep. No. 971, 81st Cong., 1st Sess., p. 3):

> Section 3 of the bill relates to our recommendation which is as follows:

> We recommend that section 5 (2) (b) be amended by removing therefrom the requirement that "a public hearing shall be held in all cases where carriers by railroad are involved." (See Annual Report, 1947, recommendation No. 3, p. 47.)
>
> Cases involving railroads are not invariably of such importance that a public hearing is necessary or desirable. Where such cases are of minor importance, the mandatory requirement causes unnecessary expense and delay. We believe that the Commission should have the same discretion as to holding a hearing in railroad cases as it has in those involving motor or water carriers. Section 3 of the bill would give it this discretion.

The Commission's interpretation is on all fours with that of Congress.

Nor may it be said that the Commission abused its discretion in refusing to conduct a hearing on the basis of the unsupported representation of holders of a small fraction of Alleghany's common stock that "Alleghany corporation is not in control of * * * the New York Central" (R. 392), a representation which was in direct contradiction of their statements in an earlier pleading filed with the Commission.[18]

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[18] In a motion of February 4, 1955, to deny the Alleghany application, the appellees stated (R. 322):

"* * * during the period January 19, 1954, to June 13, 1954, the Alleghany Corporation and its nominees Robert R. Young, Allan P. Kirby and the 13 other present members of New York Central's Board of Directors (except Alfred E. Perlman) by stock purchases and the solicitation of proxies and other acts in interstate commerce sought to acquire and did acquire control of the applicant railroad and bridge companies herein.

Surely, the Commission was entitled to take into account the shifting and uncertain nature of the appellees' allegations in deciding not to accord them a hearing. Thus, Alleghany's allegations that it had acquired control of New York Central were not squarely challenged, and those allegations were entirely consistent with its prior history as a railroad holding company.

Equally important, in determining whether the Commission abused its discretion in denying appellees a hearing, it should be noted that their allegations (and the observations of the court below) go no further than the contention that Alleghany had acquired control of New York Central jointly with Messrs. Young, Kirby, Murchison and Richardson (R. 394–395). Such an allegation, if true, did not deprive the Commission of power to assert jurisdiction over Alleghany under Section 5 (3). Contrary to the apparent view of the court below (*supra*, p. 65), both the purposes of Section 5 (2) and the broad definition of control in Section 1 (3) (b) compel the conclusion that Section 5 (2) reaches the same acquisitions of control whether by a single non-carrier or two or more non-carriers jointly. Otherwise, a small group of non-carrier persons acting in concert would be free to acquire joint control of any number of carriers without regard to Section 5. Assum-

"* * * Alleghany Corporation and its nominees were successful in acquiring on June 14, 1954, the control of the New York Central Railroad Company and its system companies, and since June 14, 1954, Alleghany and its nominees have taken further steps by stock purchases and otherwise to consummate and consolidate their control, including the appointment of various officers and counsel of Alleghany as officers and counsel of New York Central."

ing such joint control, it would have been entirely consistent with the Commission's past practice under Section 5 (3) for it to determine that Alleghany, as a corporation, should be subject to the requirements of Sections 20 and 20a as to reports, accounts and security issues and to determine that the non-carrier individuals with whom it shared such control should not be subject to those requirements. Since the appellees' allegations, even if true, would not have deprived the Commission of jurisdiction under Section 5 (2) and (3), there was no need for a hearing on those allegations.

As we have pointed out above at pages 64–67, the Commission had ample basis for its finding of control, the existence of which was common knowledge in the financial world. Otherwise, in permitting the appellees to intervene for purposes of urging reconsideration of the Division 4 report (R. 517) the Commission did consider the views presented in their petitions and affidavits as to the law and the proper interpretation of Section 5.[19]

IV. The three-judge court lacked jurisdiction to enjoin Alleghany from violating the Investment Company Act

The final judgment of the district court not only set aside in part the Commission's order in the Bridge Company case, and, in their entirety, the Commission's

[19] The district court dealt only with the necessity for a hearing in the Bridge Company proceeding, and did not hold that appellees were improperly denied a hearing in the preferred stock order proceeding. Hearing in the latter is governed by Section 20a (6), providing that "The Commission may hold hearings *if it sees fit* * * *. The appellees were permitted to and did present their views with respect to the preferred stock issue in pleadings, affidavits and briefs (R. 517, 518, 537, 554).

orders in the preferred stock case, but also enjoined Alleghany from taking any steps to carry out the preferred stock exchange (except the 900,000 shares of 6% convertible preferred stock issued prior to the stay granted by Mr. Justice Harlan (R. 555–557)). We do not challenge the jurisdiction of the district court to review these orders of the Commission (assuming that the appellees had standing to challenge them). The court set aside these orders of the Commission at least in part on the ground that in the Bridge Company case the Commission was without jurisdiction to determine pursuant to Section 5 (3) that Alleghany should be considered as a carrier for the purposes of Section 20a, which requires the Commission's approval of security issues. Assuming that this ground for the lower court's decision is correct, it does not support that portion of its final judgment which enjoins Alleghany from proceeding with the preferred stock exchange. Rather, that conclusion, if correct, establishes only that Alleghany was free to issue its new preferred stock without the Commission's approval under Section 20a.

However, the district court's opinions leave no doubt that its judgment was designed to enforce the Investment Company Act, as well as to set aside orders of the Interstate Commerce Commission. Thus, in the district court's Opinion Granting Application For Interlocutory Injunction, it concluded that "From the instant of Alleghany's relinquishment of control of the C. & O. and the Nickel Plate, plaintiffs here were entitled to the special protection which Congress has provided for stockholders in investment companies which do not control railroads" (R. 615). Again, in

the district court's final opinion of November 18, 1955, it concluded that "as Alleghany was not within I. C. C. regulation when it proposed to issue its new preferred stock, the issuance of that stock would violate the Investment Company Act" (R. 657). Thus, it is clear that in enjoining Alleghany from proceeding with the preferred stock exchange, the three-judge district court was enforcing the Investment Company Act.

It well settled that a three-judge court assembled under the provisions of the Urgent Deficiencies Act (28 U. S. C. 1336, 1337, 2321–2325) has only "jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission". Indeed, under this court's decisions in *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, and *United States* v. *Griffin,* 303 U. S. 226, not all orders of the Commission are reviewable by a three-judge court. In any event, a series of decisions by this court emphasizes that nothing except the validity of orders of the Commission under the Interstate Commerce Act may be determined by such a court.[20]

Thus, Title II of the Transportation Act of 1920 (41 Stat. 456) required the Commission to certify to the Secretary of the Treasury the amount necessary to be paid to each railroad in fulfillment of the Federal guaranty of its income for the six-month period following the termination of Federal control. In holding that the Commission's certifications were not reviewable by a three-judge court, in *Great Northern Ry.* v.

[20] The Interstate Commerce Commission has a general and continuing interest in the scope of review in proceedings under the Urgent Deficiencies Act.

United States, 277 U. S. 172, 181–182, this Court stated:

> * * * Because issuing certificates is not a part of the Commission's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.
>
> * * * For the inapplicability of the special remedy given by the Urgent Deficiencies Act is due to the fact that the certificate deals with a subject matter not within the scope of the Commission's duty to regulate commerce, and hence, not within the purview of that remedy. * * *

In *Pittsburgh & W. Va. Ry.* v. *United States*, 281 U. S. 479, 488, it was held that a three-judge court assembled to review an order of the Commission lacked jurisdiction to consider a claim that a carrier should be enjoined from taking action authorized by the Commission on the ground that its directors had violated stockholders' rights under state law. In *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 28–29, a similar claim of breach of duty toward minority stockholders was held to be "improperly raised in this suit under the Urgent Deficiencies Act". This limitation upon jurisdiction was sharply illustrated in *Seaboard R. Co.* v. *Daniel*, 333 U. S. 118, which hinged entirely upon the validity of a Commission order under Section 5 (11) relieving a carrier from compliance with a state corporation law. The carrier brought suit in the state court to enjoin state officers from enforcing the state law against it. In holding

that the state court had jurisdiction over the suit, this Court pointed out (at p. 122–123) that:

> * * * Federal district courts have exclusive jurisdiction of suits to enjoin, set aside, annul or suspend an order of the Commission. * * *.
>
> So far as the appellant's complaint is concerned, this is not the kind of action to "set aside" a Commission order of which the federal district courts have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. * * *.

In the instant case, if the three-judge court correctly held that the Commission was without jurisdiction to declare that Alleghany should be considered as a carrier for the purpose of security issues under Section 20a, then we may assume that it had the power to set aside the Commission's order under Section 20a authorizing Alleghany to issue new preferred stock. But at that point its authority was exhausted. The holding that the Commission lacked jurisdiction under Section 20a over Alleghany meant only that Alleghany could issue its securities without the Commission's approval. Whether or not Alleghany's issuance of preferred stock would violate the Investment Company Act or any other Federal or State statute was of no concern to a three-judge court with power only to review orders of the Interstate Commerce Commission under the Interstate Commerce Act. *Great Northern Ry.* v. *United States*, *supra*.

The instant case thus differs from the *Chicago Junction* case, 264 U. S. 258, 270, in which a Commission order approving acquisition of control by one carrier of another through purchase of stock and a lease under the original Section 5 (2) was set aside because the Commission had not held a hearing. In that case, since the Commission had jurisdiction over the transaction, it could not be consummated without a hearing and this Court held that a prayer to set aside the lease and stock purchase could be joined in a suit under the Urgent Deficiencies Act to set aside the Commission's order. Here, if the Commission lacks jurisdiction over Alleghany's issuance of preferred stock, the result is that Alleghany may issue it without the Commission's authorization.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted.

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APPENDIX A

Statutes Involved

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1 (3) (b), 5 (2), 5 (3), 5 (4), are as follows:

SEC. 1 (3) (b) For the purposes of sections 5, 12 (1), (20), 204 (a) (7), 210, 220, 304 (b), 310, and 313 of this Act, where reference is made to control (in referring to a relationship between any person or persons and another person or persons), such reference shall be construed to include actual as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control.

SEC. 5 (2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of

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two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad

subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph

(2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall required a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

SEC. 5 (3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Section 20 (1) to (10), inclusive, of this part, sections 204 (a) (1) and

(2) and 220 of Part II, and section 313 of part III, (which relate to reports, accounts, and so forth, of carriers), and section 20a (2) to (11), inclusive, of this part, and section 214 of part II, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a of this part and of section 214 of part II, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

SEC. 5 (4) It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5), the words "control or management" shall be construed to include the power to exercise control or management.

APPENDIX B

Legislative History of Section 5 of the Interstate Commerce Act

The provisions of section 5 of the Interstate Commerce Act concerning combinations and consolidations of carriers are the product of three major efforts to formulate an effective statute. They had their genesis in the Transportation Act of 1920, were extensively rewritten and enlarged in the Emergency Railroad Transportation Act of 1933, which was the progenitor of the provisions pertinent to this case, and were further modified by the Transportation Act of 1940.

Section 5 of the original Interstate Commerce Act, passed in 1887 (24 Stat. 386), dealt solely with the pooling of traffic and revenues by the railroads, which it forbade. Having undergone some modification, principally to permit such action upon approval by the Commission, it survives in paragraph (1) of the present section. With the emphasis on competition, to the extent that the effect of railroad unifications was to materially reduce free and normal competition, they were subject to the prohibitions of the Federal antitrust laws.[1]

With the passage of the Transportation Act of 1920 (41 Stat. 480), Congress adopted a new policy in railroad regulation and sought affirmatively to build up a system of railways adequate to handle all of the traffic of the country. *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, 478.

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[1] For example, railroad combinations were held to be violative of the Sherman Act in *Northern Securities Company* v. *United States*, 193 U. S. 197 (1904); *United States* v. *Union Pacific Railroad Company*, 226 U. S. 61 (1912); and *United States* v. *Southern Pacific Railroad Company*, 259 U. S. 214 (1922).

For the first time, unification was advanced as a cure for the ills besetting the railroad industry in the interest of better service for the public and economy of operation. While rejecting the philosophy of compulsory consolidation, Congress enacted comprehensive legislation designed to encourage and foster orderly voluntary unifications into well-balanced competing systems to be carried out under the supervision of the Commission.[2]

Specifically, the Transportation Act of 1920 amended the Interstate Commerce Act by adding seven paragraphs to section 5, numbered (2) through (8). Paragraph (2) authorized the Commission to aprove the acquisition of control by one carrier of another carrier or carriers "either under a lease or by purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation" where it found, after hearing, such acquisition to be in the public interest. Paragraphs (4) and (5) related to the consolidation plan, the former requiring

[2] The policy was an outgrowth of the experience gained from the operation of the railroads by the Government as a single unified system during World War I. An attempt to solve the problem of the weak roads, whose continued existence was threatened, and to make possible general economies in operation while preserving constructive competition, it was developed in extensive hearings out of which the Transportation Act of 1920 emerged. See *St. Joe Paper Co.* v. *Atlantic Coast Line Railroad Co.*, 347 U. S. 298, attaching an appendix at page 315 summarizing the history of section 5; S. Rep. No. 304, 66th Cong., 1st Sess. pp. 13–14, setting forth the rationale for the policy; and H. R. Rep. No. 650, 66th Cong., 2d Sess. pp. 63–64 (Conference Report), where the compromise between Senate and House versions, including the rejection of compulsory consolidation, is discussed and the basic provisions of the 1920 Act are summarized.

that the Commission prepare and adopt a plan for the consolidation of railway properties into a limited number of systems, preserving competition as fully as possible and maintaining existing routes wherever practicable, and the latter providing for publicity and hearing prior to adoption of the plan and for modification of the plan when the public interest would thereby be promoted. Paragraph (6) empowered the Commission to approve consolidation of two or more railroads into one corporation upon their application and after public hearing, provided the proposed consolidation was in harmony with the plan to be adopted by the Commission and would promote the public interest. Paragraph (8) relieved any carriers authorized to combine under paragraphs (2) or (6) from the operation of the antitrust laws.[3]

Defects in the Act of 1920 soon became apparent, and it was undisputed that the hoped for beneficial unifications were not being realized. Perhaps most importantly, while the consolidation program was effectively stymied,[4] unifications short of technical consolidation unrelated to any over-all plan and not subject to Commission approval were occurring. The Commission's power, under section 5 (2), to approve acquisitions of control by one carrier of another did not cover combinations effected through means of holding companies or other noncarrier groups.

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[3] Paragraph (3) merely gave the Commission authority to issue orders supplemental to any order made under paragraphs (1) and (2). Paragraph (7) authorized consolidation of express companies.

[4] Consolidations permitted under section 5 (6) had to conform to the comprehensive plan which the Commission was directed by 5 (4) to prepare, a plan which the Commission did not adopt until 1929 (159 I. C. C. 522) after repeatedly questioning its feasibility and asking to be relieved of the burden (See *e. g.*, 39 I. C. C. Ann. Rep. 13 (1925)).

Stock of Denver & Rio Grande Western R. R. Co., 70 I. C. C. 102.

In its annual report for 1929, the Commission called attention to this loophole in the law and to the variety of methods for bringing about combinations of carriers through the holding company device, as illustrated by the facts with respect to such holding companies as the Alleghany Corporation and the Pennroad Corporation, 43 I. C. C. Ann. Rep. 79–83 (1929). Pointing out that where combinations may be brought about without authority of or regulation by the Commission, the subjection of the unification of railroads to the orderly processes of the carefully planned scheme of public regulation envisioned by section 5 was likely to be defeated, the Commission called the matter to the attention of Congress with the suggestion that it deserved thorough investigation and serious consideration. *Id.* at p. 82.

The House of Representatives responded to the Commission report by authorizing its Committee on Interstate and Foreign Commerce to investigate the ownership and control of stock or capital interests in common carriers by holding companies and others and the organization, financing, operation and control of such holding companies and others, and to report to the House, making such recommendations for legislation as seemed advisable. H. Res. 114, 71st Cong., 2d Sess. The product of the investigation was a three volume report, *Regulation of Stock Ownership in Railroads,* H. R. Rep. No. 2789, 71st Cong., 3d Sess., commonly known as the "Splawn Report" after the Committee's special counsel.[5]

[5] For the results of a general survey of the matter of consolidation and unification of railroad properties, see the *Preliminary Report of Study of Railroad Consolidations and Unifications*, 71st Cong., 3d Sess., issued by the Senate Committee

While rejecting the notion that holding companies should be outlawed (*Id.* at pp. XVII–XVIII),[8] the report found that certain railroad systems were in desperate competition for strategic properties, particularly in eastern territory, with the acquisitions of such holding companies as Pennroad and Alleghany under the Van Sweringen brothers notable examples p. XIV). It went on to state (p. XV):

> Regardless of the intent or motive which might be alleged, the commission was correct in its fear that the effect of these acquisitions of control by nonoperating companies not within its jurisdiction would be so to entrench particular interests in so far as particular properties are concerned that consolidation might perhaps in effect be accomplished without the approval of the Congress. Certainly the difficulties would be so increased as to make it well nigh impossible to bring about the agreement necessary to an orderly and satisfactory unification of railway properties in eastern territory. What has been done in the East could easily be duplicated when there might be provocation in any other part of the country.

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on Interstate and Foreign Commerce in 1931, pursuant to S. Res. 290, 71st Cong., 1st Sess. This report lists numerous claimed defects in the Transportation Act of 1920 (pp. 27–29), including the holding company problem, and summarizes proposed amendatory legislation introduced during the 1924–1929 period (pp. 29–38). With respect to the holding company problem, the report points to the definition of the problem in the Commission's annual report for 1939, but defers to the investigation which culminated in H. R. Rep. No. 2789 for its discussion (pp. 193–197).

[8] It was reasoned that the looser form of combination offered by the holding company might be desirable as an intermediate step to complete consolidation and that, under certain conditions, the holding company might well be preferable to the operating company as a basis of railway consolidation. *Ibid.*

> The holding company has lent itself as a convenient instrumentality in this terrific struggle between the railway giants of the East over coveted properties. An amendment to paragraph (2) of section 5 can be drawn so as to bring these holding companies under the jurisdiction of the commission in so far as they seek acquisition of control of railroads. It seems that such an amendment should be passed with promptness. It need not wait upon legislation concerning other phases of holding company activity.

Three recommendations were made in the report, the principal one being "that paragraph (2) of section 5 * * * be amended so as to bring within the jurisdiction of the Interstate Commerce Commission for approval or disapproval any acquisition of the control of a railroad which would result in bringing that road into affiliation with, in control of, or under the management of another railroad, whether the acquisition be by holding company or otherwise" (p. LXXXV).[7] In its annual report following publication of the above report, the Commission expressed its "hearty agreement" and added its opinion that the accounts and capitalization of a holding company which is allowed to control a railroad through ownership of its stock should be subject to regulation by the Commission. 45 I. C. C. Ann. Rep. 84–86 (1931).

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[7] The remaining two recommendations were "that at the next session of Congress the committee shall give consideration to whether or not legislation is necessary to deal with any past acquisitions of railway properties such as are disclosed in this report, and which have not had the approval of the Interstate Commerce Commission as being in the public interest", and "that the scope of the investigation authorized by House Resolution 114 be broadened to include all holding companies engaged in interstate commerce." *Ibid.*

For the purpose of strengthening the 1920 legislation dealing with railroad combination and eliminating its defects, Congress enacted Title II of the Emergency Railroad Transportation Act of 1933 (48 Stat. 217–220), customarily called the "holding company bill," which for present purposes is the statute substantially as it now exists.[8] Without departing from the underlying policy of furthering orderly consolidations on a voluntary basis, the new legislation completely recast the provisions of section 5 of the Interstate Commerce Act, subjecting all forms of combination to Commission jurisdiction under a uniform rule. See, *e. g.*, S. Rep. No. 87, 73d Cong., 1st Sess., pp. 8–9; H. R. Rep. No. 193, 73d Cong., 1st Sess., p. 16.

Briefly, paragraphs (4) and (5), relating to the adoption by the Commission of the consolidation plan, were retained and renumbered paragraphs (2) and (3), and paragraphs (2), (3), (6), (7), and (8) were struck out and replaced by new paragraphs (4) through (17). In a major revision, new paragraph (4) incorporated the substance of the former paragraphs governing the actual combining of railroad properties (paragraph (2), dealing with acquisitions of control, and paragraph (6), dealing with consolidations) in a single, comprehensive paragraph aimed at subjecting all forms of combination, including those effected by noncarriers such as holding companies, to uniform treatment under Commission jurisdiction. This is basically the present paragraph (2). New paragraph (5) subjected non-carrier corporations authorized under paragraph (4) to acquire control of

[8] The Transportation Act of 1940 was responsible for some significant changes in section 5 and for some relatively minor changes in the provisions pertinent to this case. These changes are noted later, *infra*, pp. 109–110.

carriers to the provisions of section 20, with respect to accounts and reports, and to section 20a, relating to the issuance of securities and the assumption of liabilities, "to the extent provided by the Commission." Its counterpart is present paragraph (3).[9]

As H. R. 9059, the holding company bill was the subject of thorough hearings in the 72d Congress before the House Committee on Interstate and Foreign Commerce, with Dr. Walter Splawn, special counsel for the Committee, and Commissioner Eastman as the

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[9] Other amendments to section 5 introduced by the 1933 Act to bring railroad combinations solidly within the orbit of Commission supervision were as follows: Paragraph (6) made it unlawful to accomplish or effectuate the control or management in a common interest of two or more carriers, however such result is attained, except as provided in paragraph (4); paragraphs (7) and (8) supplemented (6) without limiting its scope by defining types of transactions deemed to accomplish or effectuate control or management in a common interest; paragraph (10) authorized the Commission to investigate and determine whether any person is violating paragraph (6) and to require appropriate action to prevent continuance of any violation found; paragraph (11) empowered the Commission to provide for restricting the voting power of stock in any carrier, not acquired with Commission approval, where it finds that its holding by any person has the effect of preventing or hindering the master consolidation plan. Paragraph (15) relieved carriers and any corporation affected by any order made under section 5 from the operation of the antitrust laws. The counterparts of paragraphs (6), (7), (8), (10), and (15) are paragraphs (4), (5), (6), (7), and (11), respectively, of present section (5). Paragraph (11) was eliminated by the 1940 Act. See, *infra*, p. 109.

For a good general discussion and analysis of the 1933 amendments to section 5, see 3A, Sharfman, *The Interstate Commerce Commission* 494–499 (1935).

principal protagonists for the bill.[10] Introduced into the Senate as S. 844, it was the subject of hearings which were much more limited in view of the protracted hearings held in the House. Hearings before the Senate Committee on Interstate Commerce on S. 843 and S. 844, 73d Cong., 1st Sess., pp. 4, 56. On May 4, 1933, the proposed bill was reintroduced in the 73d Congress, 1st session, as Title II of companion bills H. R. 5500 and S. 1580. 77 Cong. Rec. 2908, 2860. There it was debated in both the House and the Senate and was discussed in two reports.[11] On June 16, 1933, S. 1580 became law as the Emergency Railroad Transportation Act of 1933.

In an effort to be of as much help as possible to the Court in its construction and interpretation of

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[10] The measure was the product of the efforts of Congressmen Rayburn and Parker, Chairman and member, respectively, of the House Committee on Interstate and Foreign Commerce; Dr. Splawn; Commissioner Eastman; and Mr. Perley of the drafting service. See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9059, 72d Cong., 1st Sess., pp. 21, 52, 117; Hearings before the Senate Committee on Interstate Commerce on S. 843 and S. 844, 73d Cong., 1st Sess., p. 52. It had the unanimous approval of the Interstate Commerce Commission. See Hearings on H. R. 9059, *supra*, p. 238.

[11] The House and Senate debates which discuss the holding company bill appear at 77 Cong. Rec. 4856 *et seq.* and 4429 *et seq.*, respectively. The reports are S. Rep. No. 87 and H. R. Rep. No. 193. A third report, H. R. Rep. No. 213, is limited to an explanation of certain agreements reached between Senate and House conferees. Because the prior hearings were deemed adequate, no hearings on Title II of H. R. 5500 and S. 1580 were held in the 73d Congress. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5500, 73d Cong., 1st Sess., p. 7; Hearings before the Senate Committee on Interstate Commerce on S. 1580, 73d Cong., 1st Sess., p. 1.

present Sections 5 (2) and 5 (3), we are setting forth in detail excerpts from the hearings, debates, and reports on Title II of the 1933 Act which bear on the purposes and interpretations of the comparable provisions of that Act.

Hearings Before the House Committee on Interstate and Foreign Commerce on H. R. 9059, 72nd Cong., 1st Sess.

Testimony of Dr. Walter Splawn:

> The new provisions have to do with bringing the railroad holding company, insofar as its activities affecting consolidation are concerned, within the jurisdiction of the Commission. That language, at first, looks a little complicated, but when you study it, I think you will agree, as we all have agreed, that it is rather simple and goes directly to the object that is, bringing the holding companies under the jurisdiction of the Commission, for what purpose? Merely insofar as their activities affect the consolidations of railroads.
>
> And, when a holding company is authorized to acquire a railroad in the public interest, the bill, as the full Commission recommends in its annual report, calls upon such a holding company to make reports as to accounts to the Commission under the existing provisions of the Act; also requires the holding companies to come to the Commission when they want to issue securities, if the issuance of the securities will affect the credit and capacity to render service of the carriers owned by the holding company. It also contains the provisions for divestment; that is, to compel a company to divest itself of stock when the company holds a carrier without the consent of the Commission and holds it in such a way as to bring it into a system without the approval of the Commission (p. 19).

> * * * the object of the bill is to supplement the provisions of Section 5 of the Interstate Commerce Act, by recognizing the fact that a plan for the consolidation of railroads has been formulated as required by the provisions of that section, and by adopting appropriate measures calculated to prevent consolidations, unifications, and acquisitions and holdings of control of railroads from being effectuated and maintained in such manner and under such circumstances as will defeat the consolidation plan which is the basis of the public policy established by Congress with respect to railroad consolidation (pp. 278–279).[12]

Testimony of Commissioner Joseph B. Eastman, appearing as chairman of the Commission's legislative committee:

> At the outset it may be of help to state, briefly, the problem which H. R. 9059 is designed to meet, as I understand it. In Section 5 of the Interstate Commerce Act Congress has manifested a clear purpose to place the consolidation or unification of the railway properties of the continental United States into a limited number of systems, completely under the control of the Commission. Without such a purpose the provision for a consolidation plan would be meaningless. Experience has shown, however, that as it stands Section 5 does not accomplish that result. On the contrary, unifications may be, and in important instances have been, effected without any supervision whatsoever by the Commission.
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> * * * * *
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> An important weakness of Section 5, as it now stands, is that it places no control on the activities of so-called holding companies in

[12] For an informative, paragraph-by-paragraph analysis of the bill, see the testimony of Dr. Splawn at pages 26–44.

effecting unification of railway properties into systems (p. 48).

Paragraph (2), relating to acquisitions of control, was apparently designed originally to serve chiefly as a stopgap prior to the adoption of the complete plan of consolidation. It made unifications of a less permanent form possible until such time as actual consolidations could be effected. Now that the plan has been adopted, no good reason appears why paragraphs (2) and (6) should not be combined.

H. R. 9059 undertakes to cure these defects. The new paragraph (4) on page 2 is a substitute for the present paragraphs (2) and (6). It proposes to authorize, under Commission supervision, every legitimate and desirable method of combining railway properties, including consolidations, mergers, purchases, leases, operating contracts, and other acquisitions of stock control of carriers by other carriers, and also by a single holding company.

* * * * *

All combinations under the methods specified; must be in harmony with and in furtherance of the plan of consolidation, and the Commission must find that they will promote the public interest before approving them. The Commission is also given full authority to prescribe modifications and just and reasonable terms as in the present law. It is further provided that if union through the medium of a non-carrier holding company is authorized by the Commission, the latter shall have jurisdiction over the capitalization of such holding company and power, in its discretion, to regulate accounting, inspect books and records, and require reports (pp. 55–56).

The [subdivision of proposed paragraph (4)] designated (C) beginning on page 8 is a new provision. The necessity for it arises because it seemed desirable to provide in paragraph (4)

for possible approval by the Commission of a method of putting two or more railroads together through the medium of a single holding corporation. I think I said last Friday that the reason why I thought that ought to be included was because Professor Bonbright in the chapter which he wrote for House Report 2789, entitled "'Shall the Holding Company be Outlawed?" made a very good argument for the use of a single holding company to bring about a union of railways under certain conditions.

I question whether adequate occasion for such a method could be shown except in rare instances, but it is conceivable that this could be shown. In such an event, the condition designated (C) provides that the holding company shall be subject to the supervision of the Commission with respect to accounts and capitalization just as if it were a carrier. This is necessary in the public interest, for in the event of a combination through such a holding company, the latter becomes a medium for financing and administering the affairs of the controlled railroad companies, and supervision of its operation will be just as essential as supervision of the operations of the carriers (pp. 59–60).

Congressman Huddleston inquired of Doctor Splawn whether paragraph (5) prohibits all stock pools or voting trusts. It prohibits them only insofar as they result in accomplishing or effectuating control or management of two or more railroads in a common interest. It should be borne in mind that the bill deals only with the matter of combining or uniting railroad companies or properties (p. 61).

The holding-company operations have had the result of bringing certain railroads under common control, or under the influence of other railroads, without the approval or supervision of any public body. The question has been asked whether what they have done has been

inconsistent with the public interest. This has seemed to me immaterial for present purposes. Congress has undertaken to bring the process of railroad unification under public control. Once a policy is adopted it ought to be enforced. At present there is no effective control. It is clear that unifications can be accomplished without public supervision and regardless of what the public interest may be. If there is any virtue in or need for public control the situation is dangerous and ought to be corrected" (p. 67).[13]

I believe the announced policy of the Congress is that unification or combination of railroad properties shall be under Federal control, and that as the matter now stands, it is not under effective public control. This bill is an attempt to make the control effective" (p. 80).

The fact is clear beyond dispute that these holding companies have been bringing carriers under common control and hence combining them without any supervision or approval by the Commission. * * *

The bill before you is an attempt to bring the process of railroad unification under effective public control and supervision and to forestall for the future such unsound financial operations as have taken place in the past. It is a demonstrated fact that the process of railroad unification is very far from being under effective

[13] Using the Pennroad Corporation and the Van Sweringen controlled Alleghany Corporation as examples, Commissioner Eastman then proceeded to set forth two respects in which, in his opinion, the operations of holding companies have been inconsistent with the public interest (pp. 67–74; see also pp. 247–250). First, he outlined financial practices which he regarded as unsound, resulting in inflated capital structures and overloading with fixed charges. Secondly, he pointed to activity in bringing about unapproved unions of railroads in a common interest which could complicate the entire consolidation program.

public control and supervision at the present time" (pp. 250-251).

Mr. MAPES. As I understand it, the Interstate Commerce Commission, under existing law, has no control over holding companies, not common carriers, of the stock in common carriers, and this bill, among other things, is to give the Interstate Commerce Commission control over such holding companies that acquire the control of the stock of two or more railroads.

Commissioner EASTMAN. Yes; that is, the intention of the bill is to put under the jurisdiction of the commission the combining of railroad properties through the medium of a holding company. It also provides that if such a combination through a holding company is permitted, then that holding company shall come under the jurisdiction of the commission with respect to its stock and with—

Mr. MAPES (interposing). But leaving out of consideration the word "combining", as I understand the bill, it makes it unlawful for any holding company to acquire—makes it unlawful "for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock" without any reference to what it intends to do with that control; is that right?

Commissioner EASTMAN. Yes; unless that is approved by the commission (p. 255).

What we are proposing in this bill is a means of protecting the policy which we understood Congress to have adopted in section 5 of bringing the unification of railroad properties under the complete supervision of its agency, the Interstate Commerce Commission (p. 261).

Mr. CROSSER. Mr. Commissioner, almost the one concern that seems to have been expressed was that consolidations would be prevented if these holding companies were allowed to con-

tinue unrestrained. Is it not just as important if not more, that independent lines remain independent?

Mr. EASTMAN. Yes. That is my concern with respect to this bill. Not that holding companies tend to prevent consolidations, but that they being about combinations of railroads without any public supervision whatsoever (p. 276).

Hearings Before the Senate Committee on Interstate Commerce on S. 843 and S. 844, 73rd Cong., 1st Sess.

Testimony of Commissioner Eastman, appearing on behalf of the Commission.

As early as 1926 the Commission brought to the attention of Congress the fact that virtual consolidation of properties or unifications, if you like the word better, were being brought about through the medium of holding companies and without any supervision and regulation on the part of the Commission, and that through the operation of those holding companies the carriers had an opportunity to defeat the consolidation provision of the law and put together systems which might be entirely contrary to the plan of consolidation which the Commission had adopted at the direction of Congress.

It left the Commission without any real control over the unification program of the railroads. It left the consolidation plan largely a matter of form which could be disregarded at will by those who were in control of the railroad. We brought that to the attention of Congress on other occasions, and it has finally eventuated in this bill which is intended to give the Commission complete control over the situation.

* * * * *

We pointed out in connection with this matter that the operation of these holding com-

panies was subject to other abuses, besides the fact that it imperiled the railroad consolidation policy of Congress. We pointed out that the issuance of their own securities was utterly without supervision, and the price at which they bought the securities of the railroad companies. They could buy at as high a price as they saw fit, and they were free to issue, and in a number of cases did issue, bonds against those stock equities which they had purchased at those high prices, thus creating a very dangerous financial situation in the case of a financial depression such as has since occurred.

* * * * *

This act provides, in the first place, for certain methods of putting railroads together which shall be lawful, and it covers every method which the Commission believes could conceivably be in the public interest. It provides for consolidations or mergers, or acquisitions through lease or stock control of one carrier by another, and it also provides for common control through a single holding company, but makes it clear that in the event that is done the holding company shall be just as completely under the control of the Commission, so far as its operations and the issue of its securities are concerned, as are the underlying railroad companies (pp. 51–52).

It clarifies and includes and enlarges the present provisions of section 5, and makes it clear just what can be done in the way of putting railroads together, subject in every instance to the supervision of the Commission (p. 52).

It is the intent to bring the unification of the railroads completely under the supervision of the Commission, as was apparently the intent of Congress at the time the act of 1920 was passed (p. 53).

Title II proposes certain amendments to the Interstate Commerce Act as permanent legislation. First, the amendments of the consolidation provisions of the act give the Commission control over holding companies that acquire stocks of railroads, and thereby effect consolidations without approval of the Commission (p. 1).

No opposition was expressed to the committee regarding the proposal under Title II that holding companies should be under the control of the Commission insofar as purchase of stock resulted in consolidation of railroad properties. Without such control the Commission's power over consolidations is rendered practically worthless through the activities of holding companies already in existence, and others that will almost certainly be formed unless legislation of this kind is enacted (p. 3).

Paragraph (4): This paragraph, while it includes substantially the provisions of the present paragraphs (2) and (6), is more comprehensive in its scope and corrects certain ambiguities and omissions. It is intended to authorize every form of unification of railroad properties which may conceivably be in the public interest and to bring all such forms, including holding companies, under the complete supervision of the Commission, which must find them to be in harmony with the consolidation plan and the public interest. It also specifically authorizes control of two or more carriers by a single holding company if the Commission finds such control to be consonant with the consolidation plan and the public interest.

Paragraph (5): This paragraph supplements paragraph (4) by providing that if a single holding company is permitted by the Commission to acquire control of carriers as provided

in paragraph (4), such holding company shall be subject to complete supervision by the Commission of its reports and accounts and the issuance of its securities.

Paragraph (6): A means having been furnished under paragraph (4) by which all legitimate and desirable forms of unification may be effected, it is intended by this paragraph to prevent all other forms, direct or indirect. The intent is to make impossible the bringing of carriers under common control through complicated schemes involving numerous interrelated holding companies and like ingenious devices which are now possible under the existing law and which thereby nullify the intent of Congress to subject such unifications to an orderly plan and complete supervision by the Commission. Illustrations of such common control willfully set up to frustrate the intent of Congress are found in the Alleghany Co. and its maze of interrelated holding companies, and in the Pennroad Corporation dominated by the Pennsylvania Railroad, which in like manner has evaded the intent of Congress through an ingenious corporate device (pp. 8–9).

H. R. Rep. No. 193, 73rd Cong., 1st Sess.

The following is a brief explanation of such proposed new provisions. Reference may be made in this connection to the explanation by W. M. W. Splawn, appearing at pages 5 to 43 in the report of the hearings on the bill H. R. 9059, which formed the basis for Sections 1 to 4 of the present bill. Special attention is directed to pages 21 to 43. In reading such explanation, it is necessary to bear in mind that the paragraphing of the bill has been changed in its reintroduced form. However, the changes in the text of the bill are not substantial, so that the explanation, on the whole, remains accurate.

Paragraph (4): This paragraph, while it

includes substantially the provisions of the present paragraphs (2) and (6), is more comprehensive in its scope and authorizes consolidations, mergers, purchased leases, operating contracts, and acquisitions of control, if approved by the Commission as being in harmony with the consolidation plan and as promoting the public interest. It will be noted that it goes beyond the present law in that it specifically authorizes a corporation which is not a carrier to acquire control of two or more carriers, and a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier, the control in both cases to be effectuated by ownership of stock.

Paragraph (5): This paragraph supplements paragraph (4) by providing that whenever a corporation which is not a carrier acquires control of any carrier or of two or more as provided in paragraph (4), such corporation shall be subject, to such extent as may be provided by the Commission, to the provisions of the Interstate Commerce Act relating to reports and accounts and the issuance of securities.

Paragraph (6): A means having been furnished under paragraph (4) by which consolidations, mergers, purchases, leases, operating contracts, and acquisitions of control may be effected, it is intended by this paragraph to prevent consolidations, unifications, common controls, and common managements being effected, in the future, otherwise than as authorized in such paragraph (4), it being the intention that the Interstate Commerce Commission shall have an opportunity to pass upon such matters in order that transactions resulting in combinations and controls of carriers may be accomplished in an orderly manner, with due regard to the consolidation plan and the public interest (pp. 15–16).

Whether or not all or any of these unifications are consistent with the public interest does

not have to be determined in order to reveal the necessity for further legislation. The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest. Under Section 5 of the Act to regulate commerce it was the purpose of Congress to place the unification of the railway properties of the United States entirely within the control of the Commission. The investigation conducted by the House Committee on Interstate and Foreign Commerce, under H. Res. 114, reveals that wide opportunities exist for accomplishing such unifications without any such control and in complete defeat of the intent of the Congress. Moreover, these opportunities to circumvent the will of Congress, as expressed in Section 5, exist irrespective of what the public interest may be. It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will that this bill has been drawn.

This bill specifically treats a holding company which has been authorized to acquire a railroad as though it were a common carrier in that, first, it must obtain approval of the Commission to acquire control of two or more railroads; second, after obtaining such approval it must then, like the railroads, be subject to paragraphs (1) to (10), inclusive, of Section 20 of the Act (relating to reports, accounts, etc., of carriers), and to paragraphs (2) to (11), inclusive, of Section 20a (relating to issuance of securities and assumption of liabilities of carriers) (pp. 20–21).

Since the constitutionality of this bill depends largely on whether the purpose is one that Congress may validly attempt to accomplish, it may be said that the object of the bill is to supplement the provisions of Section 5 of the

Interstate Commerce Act by recognizing the fact that a plan for the consolidation of railroads has been formulated as required by the provisions of that section and by adopting appropriate measures calculated to prevent consolidations, unifications, and acquisitions of holdings of control of railroads from being effectuated and maintained in such a manner and under such circumstances as will defeat the consolidation plan which is the basis of the public policy established by Congress with respect to railroad consolidations (p. 21).

Senate Debate on Title II of S. 1580, 77 Cong. Rec. 4429 et seq.

Statements of Senator Dill, Chairman of the Senate Committee on Interstate Commerce, who guided the bill in the Senate.

I think the Senator is in error when he says that this will broaden the powers of consolidation. The section to which he has referred and which he has read will give the Commission power to control consolidation either by holding companies or by any other means that may be conceived for that purpose. The right of consolidation, the terms of consolidation, as I understand it, are not changed from the present statute, but only the power of the Commission to prevent or at least control consolidation, over which now it has no control because of the creation of holding companies and because of other devices that might be developed which are not touched upon in the law (77 Cong. R. 4434).

There is nothing in it that is not now permissible. The difference between the existing law and this bill is that under the existing law consolidations are being carried out by holding companies which are formed and which are beyond the control of the Interstate Commerce Commission, such as the Pennroad and the Alleghany Corporation, which go out and buy

railroad stocks and issue securities without any control on the part of the Commission. The reason for amending those sections of the law is not to enlarge the powers of the Commission for consolidation but to give the Commission power to prevent consolidations over which it has no control whatsoever now (*Ibid.*).

House Debate on Title II of S. 1580, 77 Cong. Rec. 4856 et seq.

Congressman Rayburn, Chairman of the House Committee on Interstate and Foreign Commerce, who guided the bill in the House, read the following excerpt from a message from the President [14] (77 Cong. Rec. 4856):

> Railway holding companies should be placed definitely under the regulation and control of the Interstate Commerce Commission in like manner as the railways themselves.

He then reviewed the history of the measure, making the following statements in the course of his presentation:

> The House of Representatives passed Resolution 114, Seventy-first Congress, second session, under which the Committee on Interstate and Foreign Commerce conducted a thorough and comprehensive investigation. The results of that investigation were published as House Report No. 2789, Seventy-first Congress, third session. Incorporated in this report at page LXXXV were the recommendations of special counsel to the effect that section 5 of the Interstate Commerce Act, as amended, be amended so as to bring within the jurisdiction of the Interstate Commerce Commission, for approval

[14] Message from the President of the United States, transmitting Tentative Recommendations for the Relief of Transportation by Railways, May 4, 1933, H. R. Doc. No. 32, 73rd Cong., 1st Sess.

or disapproval, any acquisition of the control of a railroad which would result in bringing that railroad into affiliation with, or control of, or under the management of another railroad, whether the acquisition be by holding company or otherwise, and that when a holding company is thus permitted to control a carrier by railroad, directly or indirectly, through ownership of stock, thereafter the accounts and capitalization of that holding company shall be subject to regulation by the Commission.

* * * * *

In line with these recommendations and to remedy the defects in existing law disclosed by the facts contained in House Report No. 2789, H. R. 9059 was drafted. * * *

* * * * *

The investigation under House Resolution 114 H. Rept. No. 2789, 71st Cong., 3rd sess.) disclosed that an important weakness of section 5, as it now stands, is that it places no control upon the activities of so-called "holding companies" in effecting the unification of railway properties into systems. * * *

* * * * *

The important point is that unifications and groupings of railroads have been accomplished entirely without supervision by the Commission and without any opportunity to consider the question of public interest. * * * It is to correct this condition, and to prevent through the use of holding companies and other devices the defeat of the congressional will, that this bill has been drawn.

This bill specifically treats a holding company which has been authorized to acquire a railroad as though it were a common carrier in that, first, it must obtain approval of the Commission to acquire control of two or more railroads; second, after obtaining such approval it

must then, like the railroads, be subject to paragraphs (1) to (10), inclusive, of section 20 of the act (relating to reports, accounts, and so forth of carriers), and to paragraphs (2) to (11), inclusive of section 20a (relating to issues of securities and assumption of liabilities of carriers) (77 Cong. Rec. 4857).

Statements of Congressman Milligan, member of the House Committee:

> This investigation developed that although application for the unification of certain railroads had been denied by the Commission, as against the public interest, yet the unification was accomplished through holding companies, and to all intents and purposes the consolidation was as effective as though the Commission had given its approval.
>
> This measure deprives these holding companies of the power to prevent the Commission from carrying out the mandate of the Congress. As the situation now stands, certain railroads can defeat the purpose of the law although the Commission finds its action to be in the public interest. This is the condition that this part of the bill seeks to correct.
>
> It provides that where a holding company acquires a railroad it shall be treated as though it were a common carrier, in that it must obtain approval of the Commission and then be subject as a railroad to make annual reports as prescribed by the Commission; be subject, as other carriers, to uniform system of accounts and other regulations provided in section 20 of the Transportation Act; also subject to paragraphs 2 to 11, inclusive, of section 20a regulating issuance of securities and assumption of liabilities of carriers.
>
> I can see no valid reason why holding companies engaged in the transportation business should be allowed to defeat the will of Congress

and not be subject to the same regulation as the carrier (77 Cong. Rec. 4867).

Further revisions in section 5 were made by the Transportation Act of 1940 (54 Stat. 905). The most important of these was the repeal of paragraphs (2) and (3), relating to the Commission's comprehensive plan of consolidation, of the provision in paragraph (4) requiring all combinations to conform to the consolidation plan, and of paragraph (11), providing for restricting the voting power of stock hindering the consolidation plan. Otherwise, it integrated into section 5 the provisions of section 213 of the Motor Carrier Act of 1935 (49 Stat. 543), relating to motor carrier combinations; it added subparagraphs (c) through (f) to paragraph (4) of section 5, setting forth more definite standards and further conditions respecting Commission approval of combinations; it relaxed the requirement that the Commission find that proposed combinations will "promote the public interest" as a condition for their approval, substituting the language "be consistent with the public interest."

With the repeal of paragraphs (2) and (3), paragraphs (4) and (5) were renumbered (2) and (3). In addition, certain changes were made in the wording of new paragraph (2),[15] making it even more em-

[15] The 1940 Act added the italicized language and deleted the bracketed language:

"It shall be lawful * * * for carriers to consolidate or merge their properties *or franchises* * * * or for any carrier * * * to acquire control of another through *ownership* [purchase] of its stock *or otherwise* * * * or for a *person* [corporation] which is not a carrier to acquire control of two or more carriers through ownership of their stock *or otherwise* * * * or for a *person* [corporation] which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock *or otherwise* * * *"

bracive, and section 1 (3) (b) was added to the act construing "control" broadly for purposes of section 5 and other sections.[16]

In explanation of the above changes, the following appears in H. R. Rep. No. 2832, 76th Cong., 3d Sess., being the Conference Report on S. 2009, which became the Transportation Act of 1940:

"Aside from clarifying changes, these revisions are as follows:

"1. Paragraph (2) is changed by adding the words 'or otherwise' in several places so that acquisitions of control by methods other than through ownership of stock is authorized with Commission approval.

"2. Paragraph (2) is made to cover a consolidation or merger of franchises" (pp. 68–69).

[16] With respect to the definition of "control", H. R. Rep. No. 2832, *supra*, states at page 63:

"This subsection inserts in paragraph (3) of section 1 of the Interstate Commerce Act a definition of 'control' which will apply in certain specified sections of the act where that term is used in referring to a relationship between any person or persons and another person or persons. Since the term 'person' is defined to include artificial as well as natural persons, the definition of control will cover relationships between corporations, companies, associations, etc.

* * * * *

"The application of this definition of control will in most cases be in connection with the use in the sections to which it applies of the phrase 'controlling, controlled by, or under common control with' a carrier. This phrase has been used because it has recently had the benefit of interpretation by the Supreme Court in the case of *Rochester Telephone Corp.* v. *United States* (307 U. S. 125, decided April 17, 1939)."

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In the Supreme Court of the United States

OCTOBER TERM, 1956

ALLEGHANY CORPORATION, ET AL., APPELLANTS

v.

BREESWICK & CO., ET AL.

BAKER, WEEKS & CO., ET AL., APPELLANTS

v.

BREESWICK & CO., ET AL.

INTERSTATE COMMERCE COMMISSION

v.

BREESWICK & CO., ET AL.

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court on final judgment (R. 651–673) is reported in 138 F. Supp. 123. Two supplemental opinions (R. 674–675, 680) are not